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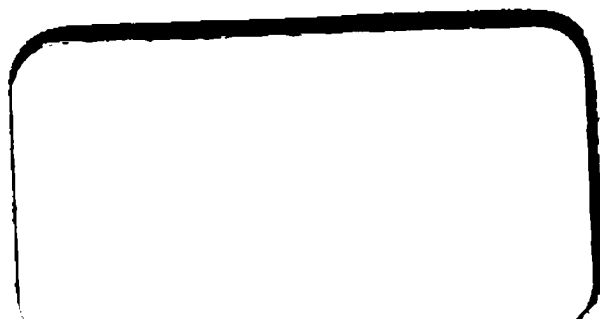
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**THE**  
**AMERICAN STATE REPORTS,**

**CONTAINING THE**

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**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN  
DECISIONS" AND THE "AMERICAN REPORTS,"**

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**OF THE SEVERAL STATES.**

**SELECTED, REPORTED, AND ANNOTATED**

**By A. C. FREEMAN,**  
**AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

**VOL. XLI.**

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**AMERICAN STATE REPORTS.**  
**VOL XII**





**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**SUMMERFIELD v. WESTERN UNION TELEGRAPH CO.**

[87 WISCONSIN, 1.]

**TELEGRAPH CORPORATIONS—DAMAGES—MENTAL ANGUISH.**—Unless otherwise provided by statute, mental anguish alone, resulting from negligent delay in the delivery of a telegram, does not constitute sufficient basis for the recovery of damages.

**TELEGRAPH CORPORATIONS—STATUTORY LIABILITY.**—Wisconsin statute, chapter 171, laws of 1885, which provides that telegraph companies shall be "liable for all damages occasioned by failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages," creates no new elements of damage, and gives no right of action for damages resulting from mental suffering alone.

**DAMAGES FOR MENTAL SUFFERING** are generally allowed by the courts in the following cases: 1. Where, by the merely negligent act of the defendant, physical injury has been sustained; 2. In actions for breach of the contract of marriage; 3. In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party.

**ACTION** for damages for negligent delay in delivering a telegram. A message was left at the defendant's office October 23, 1892, addressed to the plaintiff, and reading as follows: "Mother is dying. Come immediately." The message was signed by the plaintiff's brother, who paid the charges for its transmission. By reason of the negligent delay of the defendant, as the evidence tended to show, the plaintiff did not receive the message until the afternoon of October 28, 1892, and the plaintiff's mother died on the twenty-sixth day of October preceding. It was claimed by the plaintiff that, had he received the telegram in due time, he would have attended his mother's bedside, and that he suffered intense

anguish of body and mind by reason of his failure to receive the telegram until after his mother's death. An objection to the reception of evidence under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, was overruled, and the court instructed the jury as follows: "If you find that the message, in the exercise of ordinary diligence, considering all the circumstances of the case, was unreasonably delayed, and that if it had been delivered with reasonable promptness the plaintiff could and would have responded thereto, and reached his mother before her death, and that plaintiff suffered mental pain from a sense of disappointment, sorrow, chagrin, or grief at being deprived of being at his mother's deathbed, your verdict should be for the plaintiff in such sum as will fairly compensate him for his mental suffering, and damages, if any, to his nervous system, caused by the shock of such mental suffering." The plaintiff had a verdict for six hundred and fifty-two dollars and fifty cents, and the defendant appealed.

*Catlin and Butler, C. C. Pope, La Follette, Harper, Roe, and Zimmerman, and George H. Fearone, for the appellant.*

*McHugh, Lyons, and McIntosh, for the respondent.*

• WINSLOW, J. The exact question presented by the instruction of the court to the jury is whether mental anguish alone, resulting from the negligent nondelivery of a telegram, constitutes an independent basis for damages.

At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages: Cooley on Torts, 271; Wood's Mayne on Damages, 1st Am. ed., sec. 54, note 1. It is true that damages for mental suffering have been generally allowed by the courts in certain classes of cases. These classes are well stated by Cooper, J., in his learned opinion in the case of *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, as follows: "1. Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance is that the one cannot be separated from the other; 2. In actions for breach of the contract of marriage; 3. In cases of willful wrong, especially those affecting the liberty, character, reputation, • personal security, or domestic relations of the injured party." To this latter class belong the actions of malicious

prosecution, slander, and libel, and seduction, and they contain an element of malice. Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case, certainly no well-considered case, prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages. In that year, however, the supreme court of Texas in *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, decided that mental suffering alone, caused by failure to deliver such a telegram as the one in the present case, was sufficient basis for damages. The principle of this case has been followed with some variations by the same court in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, North Carolina, and Alabama, in cases which are cited in the briefs of counsel. On the other hand, the doctrine has been vigorously denied by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, and Dakota, and by practically the unanimous current of authority in the federal courts. All of these cases will be preserved in the report of this case, and the citations need not be repeated here.

The question is substantially a new one in this state, and we are at liberty to adopt that rule which best commends itself to reason and justice. It is true that it has been held by this court, in *Walsh v. Chicago etc. Ry. Co.*, 42 Wis. 82, that in an action upon a breach of a contract of carriage damages were not recoverable for mere mental distress; but, as we regard this action as being in the nature of a tort action founded upon a neglect of the duty which the telegraph company owed to the plaintiff to deliver the telegram seasonably, that decision is not controlling in this case.

10 The reasoning in favor of the recovery of such damages is, in brief, that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule.

Regarding, as we do, the Texas rule as a clear innovation upon the law as it previously existed, we shall decline to follow it, and shall adopt the other view, namely, that for mental distress alone, in such a case as the present, damages are not recoverable. The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 800; *Connell v. Western Union Tel. Co.*, 116 Mo. 34; 38 Am. St. Rep. 575; *Western Union Tel. Co. v. Wood*, 57 Fed. Rep. 471. See, also, Judge Lurton's dissenting opinion in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864. In the last-named opinion the following very apt remarks are made: "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated or even approximately measured. Easily simulated <sup>11</sup> and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character."

Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons. For ourselves we see no such reasons. We adopt the language of Gantt, P. J., in *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575: "We prefer to travel yet awhile *super antiquas vias*. If, in

the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

It was argued that under chapter 171 of the laws of 1885 (Sanborn and Berryman's Annotated Statutes, sec. 1770 b), damages for injuries to feelings alone might be recovered. This law provides that telegraph companies shall be liable for all damages occasioned by failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages. We cannot regard this statute as creating, or intended to create, in any way new elements of damage. Whether its purpose was to obviate the difficulties which were held fatal to a recovery in the case of <sup>12</sup> *Candee v. Western Union Tel. Co.*, 84 Wis. 471, 17 Am. Rep. 452, or to effect some other object, is not a question which now arises; but it seems clear to us that had a radical change in the law relating to the kinds of suffering which should furnish a ground for damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention.

Finally, it is said that verdicts for injuries to the feelings alone have been sustained in this court, and the following cases are cited: *Wightman v. Chicago etc. Ry. Co.*, 78 Wis. 169; 9 Am. St. Rep. 778; *Craker v. Chicago etc. Ry. Co.*, 86 Wis. 657; 17 Am. Rep. 504; *Draper v. Baker*, 61 Wis. 450; 50 Am. Rep. 148. Without reviewing these cases in detail, it is sufficient to say that there was in all of them the element of injury or discomfort to the person, resulting either from actual or threatened force, and they cannot be relied upon as precedents for the allowance of damages for mental sufferings alone.

It follows from these views that the instruction excepted to was erroneous.

By the COURT. Judgment reversed, and action remanded for a new trial.

CASSODAY, J. I fully concur in all that is said by my brother Winslow in this case, except as to the effect to be given to chapter 171 of the laws of 1885, Sanborn and Berry-

man's Annotated Statutes, section 1770 b. That statute in express terms makes telegraph companies "liable for all damages occasioned by failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages." It was manifestly intended to make such companies liable for a class of damages not recoverable against other corporations or individuals. If the statute gives no right of action for any damages except such as were recoverable at common law, then its enactment was an idle ceremony. This court, by a long line of decisions, has <sup>13</sup> held that, in a proper case sounding in tort, compensatory damages may include not merely pecuniary loss or physical injury, but also mental suffering: *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41; *Wightman v. Chicago etc. Ry. Co.*, 73 Wis. 169; 9 Am. St. Rep. 778; *Grace v. Dempsey*, 75 Wis. 313. These are only a few of many cases that might be cited. In *Cutts v. Western Union Tel. Co.*, 71 Wis. 46, it was held that, under this statute, all damages resulting directly from such negligence in transmitting messages were recoverable. Unless the words "all damages" in the act include such damage from mental suffering as was recoverable before the statute when accompanied by physical injury or pecuniary loss, then they are without meaning. "All damages" is the most comprehensive expression that could be used. The addition of any enumeration would only weaken the language employed. "It is a universal rule of construction, founded in the clearest reason," said Black, C. J., "that general words in any instrument or statute are strengthened by exceptions and weakened by enumeration": *Sharpless v. Philadelphia*, 21 Pa. St. 161; 59 Am. Dec. 759; *Webster v. Morris*, 66 Wis. 895; 57 Am. Rep. 278.

Such negligence of a telegraph company is unlike ordinary negligence. It may be similar to negligence in transmitting letters by mail. A telegram may occasionally produce pecuniary loss, but it is difficult to perceive how it can produce physical injury. This may be why the statute is confined to the owners of telegraphs. It may be difficult to measure damages resulting from mental suffering alone, but it is no more so than when accompanied by physical injury or pecuniary loss; and all agree that, when so accompanied, it is recoverable.

The judicial mind may be reluctant to depart from the



established rules of the common law, but the legislative mandate is nevertheless imperative. "It is the duty of all courts," said Tindal, C. J., "to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing": *Everett v. Wells*, 2 Scott N. R. 531; *Hanson v. Eichstaedt*, 69 Wis. 538, and cases there cited.

For these reasons I most respectfully dissent from the conclusions reached by my brethren.

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**TELEGRAPH COMPANIES — DAMAGES — MENTAL ANGUISH.**— A telegraph company is not liable for mental suffering and pain resulting from its neglect to transmit a message promptly: *Connell v. Western Union Tel. Co.*, 116 Mo. 34; 38 Am. St. Rep. 575, and note; *Western Union Tel. Co. v. Carter*, 85 Tex. 580; 34 Am. St. Rep. 826, and note, with the cases collected.

**DAMAGES FOR MENTAL SUFFERING.**—Mental suffering, unconnected with physical injury, is not sufficient to sustain an action for damages for breach of a contract: *Connell v. Western Union Tel. Co.*, 116 Mo. 34; 38 Am. St. Rep. 575, and note.

**DAMAGES FOR MENTAL ANGUISH** caused by the death of a relative through the negligence of the defendant cannot be recovered: *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143, and note.

**DAMAGES FOR MENTAL ANGUISH** in a libel case is not recoverable when the libel is not actionable *per se*: *Hirshfeld v. Fort Worth Nat. Bank*, 83 Tex. 452; 29 Am. St. Rep. 660, and note; but see *Cahill v. Murphy*, 94 Cal. 29; 28 Am. St. Rep. 88, and note. The question of the allowance of damages for mental anguish in the various classes of cases will be found thoroughly discussed in the notes to *Ewing v. Pittsburgh etc. Ry. Co.*, 30 Am. St. Rep. 711, 712; *Western Union Tel. Co. v. Rogers*, 24 Am. St. Rep. 306, and the extended note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534.

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## **STATE v. JANESVILLE STREET RAILWAY CO.**

[87 WISCONSIN, 72.]

**MUNICIPAL CORPORATIONS — ELECTRIC WIRES.**— Municipal corporations have authority to make all reasonable regulations for the location and use of electric wires in the streets, and to require all reasonable safeguards to secure the safety and convenience of the public in the lawful use of the street and the transaction of business.

**MUNICIPAL CORPORATIONS — VALIDITY OF ORDINANCE.**—An ordinance to regulate the stringing of wires in a city, and which provides that "whenever it shall be necessary to cross the line of any existing electric light, electric power, telegraph, or telephone line or lines . . . the person or company making such crossing shall supply all necessary safeguards for the same," is reasonable, and is clearly sustained under the police power of the city. Nor is such ordinance retroactive in any sense because it requires safeguards for crossings which existed at the time of its passage.

**MANDAMUS—TELEPHONE COMPANY.**—Writ of *mandamus* will issue in a proper case, on relation of a telephone company, to compel a street railway company to place guard wires above its trolley wires at crossings of the latter with the telephone wires, as required by the provisions of a city ordinance regulating the stringing of wires in the city.

**MANDAMUS** to compel the placing by the defendant of a guard wire above its trolley wires at certain points in the city of Janesville. An ordinance of said city provides as follows: "Whenever it shall be necessary to cross the line of any existing electric light, electric power, telegraph, or telephone line or lines, or any wires used for the purpose of transmitting electric energy, it shall be at a distance of not less than three feet therefrom; and the person or company making such crossing shall supply all necessary safeguards for the same, except that wherever the wires of any telegraph, telephone, or fire alarm or police system shall cross the wires of any electric light or power system, or such wires used for the transmission of electric energy, shall provide all necessary safeguards at such crossings." A penalty is also provided for any violation of the conditions of this ordinance. Other facts appear in the opinion.

*Miller, Noyes, and Miller, and Fethers, Jeffrie, and Fifield,* for the appellant.

*Jackson and Jackson,* for the respondent.

<sup>73</sup> **ORTON, C. J.** This is an appeal from an order of the circuit court sustaining the demurrer of the respondent to <sup>74</sup> the relation of the appellant, and quashing the alternative writ of *mandamus*. The material facts set out in the relation are briefly as follows:

The relator, the telephone company, obtained its right from the state to do business in the city of Janesville, and to erect and maintain poles, cross-arms, and wires over and through the streets, ways, and alleys of said city, and operated telephone wires and erected poles in the streets, ways, and alleys, with the permission, consent, and approval of said city, from 1879 until the present time, at a great expense, and has now one hundred and fifty-one telephones in said city and suburbs. The main trunk lines of the poles and wires have been, and are now, maintained upon East, Main, and Milwaukee streets. All the rights, right of way, and easements that it had previously enjoyed as a telephone company were confirmed by an ordinance of said city, dated

October 10, 1892, a copy of which is attached hereto and marked "Exhibit 1," and the company has since exercised and enjoyed the same, and all the said lines and poles have been where they are now for years, with a few exceptions, and where they should be. The relator has complied with the statutes of the state, and paid its license fee, and has a license to do business as a telephone company. The defendant is a corporation by the laws of the state, and obtained its rights to operate a street railway in said city by horse-power by ordinances of said city, dated October 8 and November 25, 1885, and operated the same on the same streets upon which the relator had its poles and wires, among others East, Main, and Milwaukee streets. By an ordinance of the city, dated December 15, 1891, the former ordinances were so amended as to give the defendant the right to use "electrical power" in operating its street railway, and on a single or double track, with all necessary curves, turnouts, switches, poles, brackets, and wires. The defendant has erected its poles, wires, and overhead wires, <sup>75</sup> over and above the streets already occupied by the relator in the manner aforesaid, and, among others, East, Main, and Milwaukee streets in said city. The defendant company is compelled to use very strong conductors of electricity to run its cars, and it uses main and trolley wires, which are not insulated, while the wires of the relator are insulated, and, though good and sufficient, can only use feeble and delicate currents of electricity in telephoning. The currents used by the defendant are exceedingly dangerous to property and persons, by setting fire to buildings, and by injuring persons coming in contact therewith. The poles of the relator are liable to break, and the wires to break and fall, by the force of storms, and this cannot be prevented; and, when the wires do fall, they make direct crosses with the wires of the defendant, and the high-tension currents of electricity used by the defendant pass in the wires of the relator, and destroy its instruments and other property, and endanger the health of its employees and others, and are liable to set fires in the city. If the defendant had constructed its railway system properly it would have placed "guard wires" at not less than four feet above its trolley wires, and in that manner prevented such serious consequences by restraining and carrying off the high-tension currents safely. Such guard wires, so placed and maintained, are the approved method of avoid-

ing or preventing the threatened mischief. The defendant is required to apply such safeguards by an ordinance of the city, dated October 10, 1892. The relator has complied with said ordinance, and the defendant has failed to do so. This is the substance of the relation.

We are of the opinion that the facts set out in the relation are sufficient to entitle the relator company to the remedy asked for: 1. The telephone company occupied the streets of the city with its poles and wires, and was in the safe and successful prosecution of its business, under <sup>the</sup> the authority of law, and "by the permission, consent, and approval" of the city of Janesville; 2. The defendant company afterwards sets its poles and extends its wires along the same streets, so that its lines frequently cross the lines of the relator, and in such near contact as to endanger the persons in its employment and its property, and threaten the destruction of its business. Has the defendant the right to do this, if it is in its power to prevent the threatened mischief? By the common maxim that one person has no right to use his own to the injury of another, and by the common principles of elementary law, it would seem that it had not. The defendant has intruded upon the established business of the relator in such way as to endanger it and the persons engaged in it, when, by the adoption of such a simple safeguard and the only practicable one, such danger can be avoided and the business of both subsist together. Ought not the defendant to be compelled to adopt such safeguard? These facts are admitted by the demurrer. The learned counsel of the respondent insists that the relator had not such priority of its business by any right. It is averred in the relation that it was established according to law, and prosecuted "by the permission, consent, and approval" of the city. That would clearly give the relator a right, and that right and its enjoyment were prior to any right of the defendant. The relator's wires are up in the streets, bearing sufficient electrical power to make telephonic communications, and the defendant crosses them in many places with its wires, bearing electrical power sufficient to propel the cars upon its street railway, and the first storm that comes may blow down the poles and wires of the relator, and its wires come in contact with the wires of the defendant, where they cross each other, and become charged with its dangerous currents of electricity, set fire to the buildings in which the telephone instruments are used, and injure

other property <sup>77</sup> and the persons employed in the "Exchange" and other places, so as to endanger or destroy the business of the relator. Ought not the defendant to be compelled to adopt the above safeguards to prevent this threatened mischief, or to withdraw its lines from the vicinity of the relator's wires? The company that caused the mischief ought to repair it.

Section 7 of the ordinance of the city, dated October 10, 1892, imposes this duty upon the company using this "electrical power system" in all cases, and requires it to apply such safeguards under a penalty. But much more is it the duty of such company when it is an intruder upon the already established business of another company. The electric force is the most powerful and dangerous agency of nature, and, even when restrained or controlled by the most perfect machinery and appliances, its high-tension currents are extremely dangerous in many directions. If a municipal corporation has not the inherent provisional or police power to pass ordinances to regulate or restrain the use of such a dangerous agency within the corporate limits, it certainly cannot have such power for any purpose.

It is claimed that said ordinance has only future operation or effect. In application to the case, section 7 of said ordinance provided: "Whenever it shall be necessary to cross . . . telephone line or lines or any wires used," etc. Has it not been necessary for the defendant company to cross these telephone lines or wires of the relator since the passage of the ordinance, and is it not now necessary to do so? Then the ordinance, by its terms, is applicable to this case. The ordinance is made to regulate existing things, and things which continue to exist, as the wires of the defendant cross the wires of the relator. Whenever, at any time, wires so cross, this safeguard must be applied. The ordinance has a present and future effect. It is said these wires crossed before the ordinance was passed. That is <sup>78</sup> true, and they have continued to cross ever since, in violation of the ordinance. The ordinance does not prohibit the crossing of such wires. It provides the remedy for it as an existing evil, and requires safeguards to be so placed as to avoid the danger to persons and property. It is not retroactive in any sense.

1. The ordinance is reasonable, because it requires that to be done which in law and good conscience the defendant ought to do for the protection of the relator, whose established

business it has endangered and disturbed; 2. It is clearly sustained under the police power of the city. "The test is whether it is designed and tends to protect some public or private right from the injurious act of the company; as when it prohibits the running of the cars of one company on any street so near the depot of another railroad as to interfere with safe and convenient access to the latter road": Tiedeman's Limitation of Police Power, 597-599. The statute of New York, requiring telegraph, telephone, and electric wires to be placed underground in streets in certain cities (Laws 1885, c. 499), was upheld in *People v. Squire*, 107 N. Y. 593; 1 Am. St. Rep. 893; *Western Union Tel. Co. v. Mayor of New York*, 38 Fed. Rep. 552. The right and authority in a city "to regulate, control, and prohibit the location, laying, use, and management of telegraph, telephone, and electric light and power 'wires and poles,' . . . in order to guard and secure the public safety and convenience," is upheld in *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 82. Ordinance to regulate street railways is upheld in *State v. Madison St. Ry. Co.*, 72 Wis. 612, and in *State v. Hilbert*, 72 Wis. 184. Cities can regulate the placing of electric wires in the streets: Keasbey on Electric Wires, 38; *Van Hook v. Selma*, 70 Ala. 861; 45 Am. Rep. 85; *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 809; *State v. East Orange*, 42 N. J. L. 127; *Western Union Tel. Co. v. Philadelphia* (Pa. Sup., Jan. 23, 1888), 12 Atl. Rep. 144; *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *Toledo etc. R. R. Co. v. Jacksonville*, 67 Ill. 87; 16 Am. Rep. 611; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98. There can be no question at this late day but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street, and require all reasonable safeguards for the same. The question is virtually so settled in this state by our own decisions.

The relator is entitled to sue out the writ of *mandamus* to compel the defendant to properly place such guard wires as the proper safeguard in such a case to protect its rights and safety. The relator is especially interested in the defendant's performance of this public duty. It is admitted to be true that such guard wires so placed are the very best and most approved method of safeguard in such case. This, then, is a clear legal right to be enforced by *mandamus*: *Marbury v. Madison*, 1 Cranch, 137; *Union Pac. R. R. Co. v. Hall*, 91 U. S. 343; *People v. Chicago etc. R. R. Co.*, 180 Ill. 175.

There is no adequate remedy in such a case, except by the writ of *mandamus*, to compel the respondent company to do what it is clearly right for it to do, and that the relator has the right to compel it to do. The penalty enforced would not cure the mischief: *Rex v. Barker*, 8 Burr. 1266; Scott and Jarnigin on Telegraphs, sec. 78; High on Extraordinary Legal Remedies, sec. 320; *People v. Boston etc. R. R. Co.*, 70 N. Y. 569; *Haines v. People*, 19 Ill. App. 354; *People v. Chicago etc. R. R. Co.*, 67 Ill. 118; *Ohio etc. Ry. Co. v. People*, 121 Ill. 488; *Indianapolis etc. Ry. Co. v. State*, 87 Ind. 489; *State v. Demaree*, 80 Ind. 519; *Uniontown v. Commonwealth*, 34 Pa. St. 298; *Howe v. Commissioners*, 47 Pa. St. 361; *Queen v. Trustees Luton Roads*, 1 Ad. & E., N. S., 860; *Cambridge v. Charleston etc. R. R. Co.*, 7 Met. 70; *Railroad Commrs. v. Portland etc. R. R. Co.*, 63 Me. 269; 18 Am. Rep. 208; *State v. North Eastern R. R. Co.*, 9 Rich. 247; 67 Am. Dec. 551; *State v. Hartford etc. R. R. Co.*, 29 Conn. 538; *State* <sup>20</sup> *v. Wilson*, 17 Wis. 687; *State v. Richter*, 87 Wis. 275; *State v. Wood Co.*, 41 Wis. 28; *State v. Chicago etc. R. R. Co.*, 79 Wis. 259; *Overseers of Porter Tp. v. Overseers of Jersey Shore*, 82 Pa. St. 275.

It is said that no such damages have yet accrued. The relation very clearly shows that such damage is imminent and threatening, and the danger is all the time present. This might be sufficient ground for an injunction to restrain the defendant from crossing the wires of the relator with its wires—a much more violent remedy. The relator does not seek to prohibit such crosses, but only to make them safe. The relator is conducting its telephone business under constant fear and apprehension. Must it wait until the full extent of the apprehended consequences have been realized? The remedy sought is clearly the proper one. The demurrer of the respondent to the relation, and the motion to quash the writ, should have been overruled.

By the COURT. The order of the circuit court is reversed, and the cause remanded, with direction to overrule the demurrer and the motion to quash the writ, and for further proceedings according to law. —

**MUNICIPAL CORPORATIONS—REGULATION OF USE OF STREETS.**—The grant of a right to use public streets to maintain and operate telegraph lines is subject to the control and regulation of the legislature. Such grant does not abdicate its power over the public streets, nor in any way curtail its police power to be exercised for the general good: *American etc. Tel. Co. v. Hess*, 125 N. Y. 641; 21 Am. St. Rep. 764, and note. See extended notes to



*Julia Building Assn. v. Bell Telephone Co.*, 57 Am. Rep. 409, and especially to *Central etc. Tel. Co. v. Falley*, 10 Am. St. Rep. 131.

**STREETS.—CONFLICTING RIGHTS OF TELEGRAPH AND ELECTRIC CAR COMPANIES IN:** See *Hudson River Telph. Co. v. Watervliet etc. Ry. Co.*, 135 N. Y. 393; 31 Am. St. Rep. 838, and note, and *Cincinnati etc. Ry. Co. v. Telegraph Assn.*, 48 Ohio St. 390; 29 Am. St. Rep. 559, and note.

## ALBRECHT v. MILWAUKEE AND SUPERIOR RY. CO.

[57 WISCONSIN, 105.]

**MISTAKE—WRITING SIGNED WITHOUT READING.**—One who has signed a written instrument, without being induced thereto through any fraud or deception, cannot avoid its effect on the ground that at the time he signed the paper he did not read it or know its contents. And the fact that the party could not read English or understand the contents of the paper signed is no excuse.

**RELEASE—BURDEN OF PROOF.**—One who signs a written release in ignorance of its contents is presumptively guilty of gross negligence, and the burden of proof rests upon him to rebut the presumption.

**PLEADING—EVIDENCE.**—The Wisconsin statute, Sanborn and Berryman's Annotated Statutes, section 1816 a, gives a right of action against a railroad company for injuries sustained by one employee through the negligence of a co-employee. And the rules of pleading require that the allegations of a complaint in an action under this statute shall show clearly the relation between the negligent party and the company relied on, and the proofs must be confined to the allegations made.

**ACTION** to recover damages for injuries sustained by the plaintiff, who was an employee of the defendant, as brakeman. The injuries were sustained in consequence of a collision caused, as alleged in the complaint, by the negligence of one of the defendant's engineers in charge of a switch engine. The complaint made no other charge of negligence against any employee of the defendant, but an effort was made on the part of the plaintiff at the time to show that his injuries were caused by the negligence of one Hickson as yardmaster. The answer of the defendant denied the charge of negligence, and, as a separate defense, alleged the execution and delivery by the plaintiff, for a valuable consideration, two hundred and twenty-five dollars, of a release under seal, whereby he discharged the defendant from all liability on account of his said injuries, and the said release was given in evidence by the defendant at the trial. As regards such release the plaintiff testified in substance, that at the time of signing the paper he did not read it; that he could not read, and did not know whether the paper was read to him or not;



also that he was a German, and did not understand the contents of the paper, and did not know that it released the defendant from obligation to pay him for his injuries, and if he had so known he would not have signed it. Witnesses on behalf of the defendant testified that the release was read to the plaintiff slowly, and that he made no complaint to the effect that he did not understand the paper. The court instructed the jury in substance that if the plaintiff knew, when signing the paper, that it was a settlement of the case, then the paper is binding on him; but if he did not understand that he was settling this claim for damages in full, but signed the paper for some other reason, the answer should be accordingly. The plaintiff had a verdict for three thousand dollars, from which he agreed to remit the two hundred and twenty-five dollars paid to him by the defendant. Judgment was then entered against the defendant for two thousand seven hundred and seventy-five dollars, and costs, and the defendant appealed.

*Winkler, Flanders, Smith, Bottum, and Vilas, and W. K. Gibson, for the appellant.*

*D. H. Sumner and T. E. Ryan, for the respondent.*

<sup>100</sup> PINNEY, J. 1. The release given in evidence, upon its face, is plainly a bar to the cause of action set out in the plaintiff's complaint. The instructions of the circuit court in respect to the effect and binding force of the release are, in substance, that while the fact that the plaintiff executed it raises a presumption that he knew its contents, and that it was a full settlement and discharge of the defendant from the claim in suit, yet the plaintiff might avoid its effect by merely showing that at the time he signed it he did not know its contents or effect. Written instruments, regularly executed and delivered, cannot be thus dealt with and avoided, or their operation defeated. There is no pretense that the plaintiff was induced to sign the release through fraud or misrepresentation, or that any deception was practiced by misreading it to him. His inability to read English or understand the contents of the paper is no excuse. This was his own negligence. He could and should have sought the assistance of some one capable of properly informing him: *Fuller v. Madison Mut. Ins. Co.*, 36 Wis. 603; *Sanger v. Dun*, 47 Wis. 615; 32 Am. Rep. 789. It cannot be tolerated that a man shall execute a written instrument, and, when called upon to abide

by its terms, say merely that he did not read it or know what it contained: *Upton v. Tribilcock*, 91 U. S. 50. The case, as put to the jury, goes upon the assumption that the plaintiff might even avoid the release though his execution of it was attributable to his own gross negligence. In the case of *Sheanon v. <sup>110</sup> Pacific Mut. L. Ins. Co.*, 83 Wis. 527, 528, the cases in this state on the question here involved were considered, and it was there held that, if the instrument was signed through the excusable mistake or negligence of the party, he is not bound by it, and that the burden of proof is on him to rebut the presumption of gross negligence. If grossly negligent, manifestly he would be bound by it; but the presumption is not a conclusive one. This is no doubt the true rule, in the absence of proof to show that the party had been deceived, misled, or overreached. Under the instructions given, the plaintiff was allowed, without showing any excuse whatever for his gross negligence, to avoid the release on the ground, simply, that at the time he signed the paper he did not know its contents and effect.

2. The right of the plaintiff to recover depended entirely on bringing his case within the statute: Sanborn's and Berryman's Annotated Statutes, sec. 1816 a, making a railroad company liable "for damages sustained by an employee thereof within this state without contributing negligence on his part, when such damage is caused by the negligence of any train-dispatcher, telegraph operator, superintendent, yardmaster, conductor, or engineer, or of any other employee who has charge or control of any stationary signal, target point, block, or switch." He was without remedy at common law, in this case, for the consequences of the negligence of his fellow-servants or co-employees. The rules of pleading require that the allegations of a complaint under this statute shall show clearly the relation between the negligent party and the company relied on, and the proofs must be confined to the allegations made. The only cause of action alleged was for the negligence of the engineer, and at the trial the evidence was directed to an attempt to show that Hickson was yardmaster, and that the injury was caused by his negligent and improper conduct. The case was taken from the jury on this point; the court holding, as matter of law, <sup>111</sup> that Hickson was in such relation (but what is not stated) to the company and the running of the road; that his negligence was the negligence of the defendant company. The

case should have been put upon some definite point or relation specified in the statute, and within the issue framed by the pleadings. Here the case, as to the ground of recovery, was submitted and decided upon an issue of which the pleadings contain no intimation whatever—a practice certainly not to be encouraged: *Kruschke v. Stefan*, 83 Wis. 883, 884. We make these remarks in view of the fact that the case will probably be tried again, when these objections may be obviated. And in this connection we will add that we think that, in view of the evidence, the question whether Hickson was yardmaster or not was one of fact for the jury under proper instructions from the court.

For the error in the charge of the court in relation to the release and evidence concerning it the judgment of the circuit court must be reversed.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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**MISTAKE OF FACT WHEN NOT RELIEVED AGAINST.**—Ignorance of a stipulation in a contract, when there is no evidence that the party was deceived or misled by any misrepresentation or concealment of fact, and his mistake must be ascribed to his carelessness or inattention, is no ground for relief: *Robertson v. Smith*, 11 Tex. 211; 60 Am. Dec. 234; *Jones v. Teuniman*, 9 Ala. 662; 44 Am. Dec. 448, and note; *Fahie v. Pressley*, 2 Or. 23; 80 Am. Dec. 401. See the extended note to *Miles v. Stevens*, 45 Am. Dec. 631, and the note to *Borden v. Richmond etc. Ry. Co.*, 37 Am. St. Rep. 635, in which latter note the later cases on this proposition will be found.

**CONTRACT—ACCEPTANCE.**—The acceptance of a written contract, without reading it, binds the acceptor if he avails himself of its provisions: *Jones v. Cunard S. S. Co.*, 153 Mass. 553; 25 Am. St. Rep. 600, and note.

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## MILWAUKEE BOILER COMPANY v. DUNCAN.

[87 WISCONSIN, 120.]

**SALE OF CHATTEL—WARRANTY OF FITNESS.**—A clause in a contract to furnish a steam-boiler “to be allowed one hundred and thirty pounds of steam-working pressure by United States inspectors,” has no reference to the capacity of the boiler, and is not to be construed as a warranty that the boiler contracted for would produce and maintain a working pressure to that amount.

**SALE OF CHATTEL—IMPLIED WARRANTY.**—Where a known, described, and defined article is ordered of a manufacturer, and the exact thing bargained for is supplied, there is no implied warranty of its fitness for the use intended by the purchaser, although it may have been stated by him that it was required for a particular purpose.

**SALE OF CHATTEL—ORAL WARRANTY.**—If an article is sold by a formal written contract, which is silent on the subject of warranty, no oral warranty made at the same time or previously can be shown, and no additional oral warranty can be ingrafted on or added to one that is written.

**CONTRACT—WAIVER OF BREACH.**—Where a contract to furnish a steam-boiler, guaranteed to be a first-class job, contains no specification as to how the grate-hangers should be placed in the furnace, and they are placed in accordance with a common and approved mode of construction, the purchaser cannot object that some other mode was not adopted. And if he saw when the boiler was delivered that the grate-hangers were too high, and assumed to change their location himself, although the manufacturer offered to do it, he afterwards has no cause for complaint that they were wrongly placed.

**CONTRACT—BREACH—DUTY NOT TO ENHANCE DAMAGES.**—Where a party has been damaged by the failure of another to perform his contract the law does not permit him to so conduct himself as to enhance the damages, and recover the damages so enhanced.

**CONTRACT—BREACH—USE OF ARTICLE PURCHASED.**—If a steam-boiler, guaranteed to be a first-class job, has apparent defects, known to the purchaser, he is in duty bound not to use the boiler in its defective condition, to his or its damage.

**ACTION** by a boiler manufacturing company to recover the last installment, with interest, of the price of a steam-boiler built and delivered by the plaintiff for the defendant. There was an express contract containing definite specifications in respect to the construction of the boiler, and the size and character of its several parts, and there was a clause therein, that we (the plaintiff) "guaranty the boiler to be a first-class job." By another clause in the contract the plaintiff was to furnish a boiler "to be allowed one hundred and thirty pounds of steam-working pressure by United States inspectors." The boiler was constructed in all respects in accordance with the specifications in the contract, and, after being duly tested, was placed in the defendant's boat. The defendant interposed the defense: 1. That the boiler leaked; 2. That it was not so built as to be allowed one hundred and thirty pounds steam pressure by the government inspector, and would not maintain a working pressure of that amount; 3. That the grate-hangers were placed too high in the furnace. The evidence given tended to show leakage of the boiler, and also that, by reason of the position of the grate in the boiler, the defendant could not get up sufficient steam. Evidence that, pending the making of the contract, the defendant informed the plaintiff that he required a boiler that would produce one hundred and thirty pounds of steam-working pressure was offered, but ruled out by the court. In

charging the jury the court instructed them, in substance, that there was no warranty in the contract as to what the boiler would do; that if the grates were places therein in accordance with a common and approved mode of construction in boilers and furnaces of the size and construction called for by the contract, then it was not a violation of the contract that another plan was not adopted, such other plan not having been provided for in the contract; that if the grates were not in the right place, and this fact was apparent to the defendant, his duty was to place them right before using the boat; and that, if the boiler leaked, when tested before starting, to such an extent as to injure the boiler, then it was the duty of the defendant to have the leak stopped, and not to use the boiler in its leaky condition, to its damage and his own. The court declined to charge that there was any implied warranty of the boiler, but did charge that if it was made according to contract, and the contract was complied with in all particulars, the plaintiff was entitled to a verdict for the amount claimed, and interest. The plaintiff had a verdict accordingly, and the defendant appealed.

*Cate, Jones, and Sanborn, and D. Lloyd Jones, for the appellant.*

*Greene and Vroman, for the respondent.*

124 PINNEY, J. 1. The clause in the contract, "to be allowed one hundred and thirty pounds of steam-working pressure by United States inspectors," was not an assurance that the boiler contracted for would produce and maintain a working pressure to that amount. It has no reference to the capacity of the boiler, and plainly refers to the government inspection of boilers under section 4418 of the Revised Statutes of the United States, and that it would be such a boiler that they would permit a working pressure of one hundred and thirty pounds, and set the safety valve accordingly. There was no express warranty therefor beyond the guaranty that the boiler should be a first-class job.

2. The contract contains, it will be seen, very many definite specifications in respect to the construction of the boiler and the size and character of its several parts, and it has been found by the jury that the contract in these respects had been complied with by the plaintiff. The jury was instructed that, if the boiler was not a first-class job in the particulars of construction specified and complained of, there was a fail-

ure to perform the contract, and, if it had not been performed in these respects, the plaintiff was not entitled to the full contract price if the boiler was worth less for that reason. So, it will be seen that the jury have found against the contentions of the defendant in these respects.

3. It was made plain that the defendant got the exact article or thing he bargained for; and, although it may have been stated that it was required for a particular purpose, still, as he did not exact an express warranty, he took the risk of its fitness for the intended use, and no warranty in that respect can be implied: *Benjamin on Sales*, sec. 657; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288. In *Jones v. Just*, L. R. 3 Q. B. 197, 202, the rule was laid down that "where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually <sup>125</sup> supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." Where the buyer in such case gets what he has bargained for there is no implied warranty: *Seitz v. Brewers' Ref. etc. Co.*, 141 U. S. 518, 519; *Goulds v. Brophy*, 42 Minn. 109; *Deming v. Foster*, 42 N. H. 165. The distinction seems to be between the manufacture or supply of an article to satisfy a required purpose and the manufacture or supply of a specified, described, and defined article, as in this case. In the former case there may be an implied warranty, but in the latter there is none. It is equally well settled that, if the article is sold by a formal written contract, which is silent on the subject of warranty, no oral warranty made at the same time, or previously, can be shown, as the writing is conclusively supposed to embody the whole contract; nor can any additional oral warranty be engrafted or added to one that is written: *Merriam v. Field*, 24 Wis. 640; *McQuaid v. Ross*, 77 Wis. 470; *De Witt v. Berry*, 134 U. S. 312. The ruling of the court in rejecting the evidence of McGregor, the tendency of which was to show a parol warranty, or that the plaintiff knew for what use the boiler was required, was correct. The instructions of the court were in accordance with these principles, and fairly submitted to the jury the question in respect to the warranty or guaranty contained in the contract.

4. As there was no express warranty other than that stated in the contract as to finish and workmanship of the boiler,

already noticed, and no warranty could be implied, the defendant has no reason to complain of the rejection of evidence bearing on the subject of damages in these respects. The claim that the grate-hangers were placed too high was properly disposed of by the court, on the ground that it was a matter of opinion with machinists and engineers how high or low they should be placed, and the contract, though entering largely into details of construction, contained no specification on the subject. The defendant testified <sup>126</sup> that he had had experience as a machinist in and about steam-engines and boilers for over fifty years, and had a machine-shop of his own for twenty-five or thirty years; that when the boiler came he saw the defect—that the hangers ought to be eight inches lower than they were; that the expense of lowering them was trifling; and that he knew, if put down eight inches, the boiler would make steam better, but he started his boat without making the change, and made no change thereafter. Although the plaintiff offered to make it, yet the defendant assumed to make it himself. He has no cause of complaint in this respect.

5. Considerable testimony was given in respect to the leaking of the boiler, but we do not see that any was excluded that was competent and proper. Three witnesses testified, in substance, that, when the boiler was inspected, its leaks were of no consequence, and not more than all new boilers do leak at first. The plaintiff had no notice of this inspection, and was not represented when it occurred. Other tests were had, and there was evidence tending to show that the defendant's failure to furnish the proper means of making these tests tended to strain and injure the boiler and cause it to leak, and it was used in the defendant's boat a considerable time without any effort being made to stop the leaks. As the jury evidently found that the plaintiff properly performed its contract, that point having been fairly submitted to them, the defendant has no ground to complain. We think that the charge of the court on this subject was correct: 1 Sutherland on Damages, 148; *Poposkey v. Munkwitz*, 68 Wis. 831; 60 Am. Rep. 658.

As there are no other questions requiring attention it follows from these views that the judgment should be affirmed.

By the COURT. The judgment of the circuit court is affirmed.



**SALES OF MANUFACTURED ARTICLES—WARRANTY, WHEN NOT IMPLIED.** The manufacturer of an article according to specifications furnished by his employer does not impliedly warrant that it will answer the purpose for which it was intended by the projector. In such a case the risk is on the latter: *Ricketts v. Sisson*, 9 Dana, 358; 35 Am. Dec. 141. The purchase of an article of a certain brand imports no warranty as to the article beyond that it is of that brand: *Hyatt v. Boyle*, 5 Gill & J. 110; 25 Am. Dec. 276, and note. See a discussion of this question in the extended note to *Bragg v. Morrill*, 24 Am. Rep. 107.

**SALES—PAROL EVIDENCE OF WARRANTY OUTSIDE OF CONTRACT:** See the extended note to *Green v. Batson*, 5 Am. St. Rep. 197, and the note to *Harrison v. Henderson*, 21 N. H. 224; 53 Am. Dec. 185. When the parties to a bill of sale reduce their agreement to writing no action will lie on a parol warranty made at the time of the sale when no fraud is alleged: *Mumford v. McPherson*, 1 Johns. 413; 3 Am. Dec. 339. To the same effect, see *Smith v. Williams*, 1 Murph. 426; 4 Am. Dec. 564. In the absence of fraud, accident, or mistake it is incompetent to show a parol warranty of agricultural implements sold by a written contract containing no warranty: *Mast v. Pearce*, 58 Iowa, 579; 43 Am. Rep. 125, and note.

**DAMAGES—DUTY TO KEEP DOWN.**—One who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not, by want of care or inexcusable negligence, allow his damages to grow and charge them all to the other party: *Wright v. Bank*, 110 N. Y. 237; 6 Am. St. Rep. 356, and extended note.

## STATE v. HANSON.

[87 WISCONSIN, 177.]

**ELECTIONS—EXCLUSION OF LEGAL VOTERS.**—When an election is honestly conducted the person who receives a plurality of the legal votes actually cast thereat is entitled to the office. This is so, although, through an error of judgment, the inspectors of election excluded votes of qualified electors sufficient to have changed the result.

**ELECTIONS—QUO WARRANTO.**—In an action of *quo warranto* to test the right to an elective office the real issue is, Who received a plurality of the legal votes actually cast at the election? Ballots offered, but rejected by the inspectors, are unavailable for either candidate.

**QUO WARRANTO** to try title to office. The relator and the defendant were rival candidates for the office of clerk of the circuit court, and it appeared from the relation, that, of the whole number of votes cast for that office, the relator received three hundred and eighty-two, and the defendant received three hundred and ninety-five. But the relation further states that in one precinct, where the relator received fifty-nine votes and the defendant received thirty-three votes, eighteen qualified voters who attended for the purpose of voting for the relator were prevented by the election officers from



voting at the election, by reason of the erroneous belief of the inspectors that they were not qualified voters; that if the votes of such electors had been received the relator would have been elected; that the defendant was wrongfully declared elected; and the certificate of election given to him; and the relation asked that the defendant be excluded from the said office and that the relator be placed therein. A general demurrer to the complaint was sustained, and the plaintiff appealed.

*O'Keefe and Foster, and O. H. Foster, and J. J. Miles, for the Appellant.*

*Wickham and Farr, for the Respondent.*

179 NEWMAN, J. The real issue in an action of *quo warranto* to test the right of an elective office is, Who received a plurality of the legal votes actually cast at the election? *State v. Norton*, 46 Wis. 332. Ballots offered, but not received by the inspectors of election, can never be made available for either candidate: *Hartt v. Harvey*, 19 How. Pr. 245; Cooley's Constitutional Limitations, 6th ed., 781; Mechem on Public Offices, sec. 237. Much less where the intention is not formulated into a ballot, but rests in intention or desire merely, can it be counted for a vote.

"The exclusion of legal votes—not fraudulently, but through error in judgment—will not defeat an election. It is an error which there is no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted; and it is obvious that it would be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have had upon the result. . . . An election honestly conducted under the forms of law ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters have been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but, as it is generally impossible to arrive at any greater certainty of result by resort to oral evidence, public policy is best subserved by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future": Cooley's Constitutional Limitations, 6th ed., 781.

180 It is not questioned that the election was honestly conducted. No fraud is claimed in the exclusion of voters. It was error of judgment only. Nor is it claimed that any of the votes cast were illegal. Nor is it disputed that the defendant received a plurality of the votes actually cast. The election should stand.

By the COURT. The order of the circuit court is affirmed.

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**ELECTIONS—EXCLUSION OF LEGAL VOTES.**—The exclusion of legal votes, not fraudulently, but through error of judgment, will not defeat an election, although the error is one there is no mode of correcting, since it cannot be shown with certainty, afterwards, how the excluded voters would have voted: *Boyer v. Teague*, 106 N. C. 576; 19 Am. St. Rep. 547.

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## FARR v. STATE BANK OF PHILLIPS.

[87 WISCONSIN, 223.]

### CONVERSION—RETURN OF PROPERTY—DAMAGES FOR LEVY OF EXECUTION.

If property not liable to seizure on execution is levied upon by mistake, or if the levy is insufficient, and the property or part of it is returned to the person from whom it was taken upon discovery of the mistake, and before an action for the conversion is brought, the damages recovered for the taking of the part so returned should be merely nominal, unless special damages apart from the mere value of the property are shown.

**DAMAGES—IMMATERIAL ERROR.**—The neglect to include nominal damages in a verdict and judgment for the value of the part of the property not returned, when the omission does not affect the question of costs, is not error justifying a reversal of the judgment.

**ACTION** for the wrongful conversion of certain chattels, to which the plaintiff claimed title under a chattel mortgage executed by one Houghton, who had possession when the property was taken by the defendant Hunt, as sheriff, under an execution in favor of the defendant bank against Houghton. The plaintiff gave notice to both defendants of his title to the property, and forbade its sale, but it was sold to various purchasers. The day after the sale, and before the commencement of this action, the defendants, thinking that an insufficient or mistaken levy and sale of the property had been made, returned the greater part of it to Houghton, but both he and the plaintiff declined to accept the property. The value of the property sold and retained by purchasers was found by a special verdict to be one hundred and fifty dollars, and the value of that returned five hundred and eighty dollars. The plaintiff's

motion, on the verdict and minutes of the court, for a judgment against the defendants for the value of the entire property was denied, and judgment given in his favor for one hundred and fifty dollars damages and costs. The plaintiff appealed.

*Wickham and Farr*, for the appellant.

*Cate, Jones, and Sanborn, and John F. Owen*, for the respondents.

225 PINNEY, J. The only error assigned is that the court should have rendered judgment for the entire value of the property converted. In the case of *Churchill v. Welsh*, 47 Wis. 39, 45, the right of the defendant in an action of trover to return the property controverted, where it is possible to do so, in mitigation of damages, was very fully considered, and it was there said that after suit brought the court will, under certain circumstances, permit the defendant "to bring the property claimed into court for the plaintiff, with the costs up to that time, and will then order a stay of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him unless he be able to show that he has been specially damaged by the conversion of the property by the defendant, in addition to its value at the time of the return; or the court will, in a proper case, after verdict, upon a tender of the property, reduce the verdict to nominal damages"; and the authorities bearing upon the subject of the return of property in actions of trover in mitigation of damages were there collated and considered. In the subsequent case of *Warder v. Baldwin*, 51 Wis. 450, 459, it was held that if an officer, as soon as he finds that he has by mistake levied upon the wrong property, tenders it back to the person from whose possession he took it, and leaves it on his premises, and thereafter asserts no claim to its possession, the damages recovered for the taking should be merely nominal, unless it is shown that the plaintiff has suffered, by reason of the seizure, special damages apart from the mere value of the property. The property seized in *Warder v. Baldwin*, 51 Wis. 450, was a reaper in the possession of 226 the mortgagor, and to whose possession it was returned, and the action was brought by the mortgagee. It was said that "if no tender be shown previous to the commencement of the action, the offer then made to return the property and pay the costs should be considered."

A mistake as to the validity of a levy or the liability of property to be seized on an execution is not distinguishable, in our judgment, from a levy or seizure of the wrong property by mistake, as in the case cited. In either case the question is as to the liability of the property to seizure and sale under the particular process. The rule is stated in 8 Sutherland on Damages, section 1141, to be that: "Where the defendant, in an honest and *bona fide* endeavor to enforce a right or a supposed right, or to exercise a power, deals with the property in such a manner as constitutes a conversion, either because the right or the power was wholly or partially wanting, or has been exceeded or irregularly asserted or exercised, the courts generally consider the whole transaction, and award only such damages as are necessary for a complete reparation."

The case of *Warder v. Baldwin*, 51 Wis. 450, establishes a reasonable and just rule, and is decisive of this appeal. There was no fact or circumstance attending the levy or sale tending to show bad faith or wanton or oppressive conduct, and calling for the application of any other rule of damages than the value of the property. It was competent, therefore, for the defendant to return the property before action to the possession of the plaintiff's bailee or custodian from which it was taken. No previous order of the court could have been obtained, for no action had then been commenced. The contention that the property returned had been injured or had deteriorated in value in consequence of the acts of the defendants, or that the plaintiff had suffered special damages for any cause, is not open for consideration, for the reason that it does not appear that the <sup>227</sup> plaintiff asked to have any such question submitted to the jury; and there is no finding of such damages in the verdict upon which the plaintiff moves for judgment. Undoubtedly, the plaintiff was entitled to nominal damages, at least, for the seizure of the property so returned; but the neglect to include such nominal damages in the verdict and judgment, when the omission does not affect the question of costs, is not error justifying a reversal of the judgment.

For these reasons the judgment of the circuit court must be affirmed.

By the COURT. The judgment of the circuit court is affirmed.

**CONVERSION—RETURN OF PROPERTY—DAMAGES.**—If the defendant in an action of trover return the property before action is brought, and the same is accepted by the owner, he can only recover for the partial conversion: *Hepburn v. Sewell*, 1 Har. & J. 211; 9 Am. Dec. 512. The return of property for a conversion of which an action of trover has been brought by the owner, and a receipt of it by him, will go to mitigate the damages: *Greenfield Bank v. Leavitt*, 17 Pick. 1; 28 Am. Dec. 268, and note. See, also, the extended note to *Woolley v. Carter*, 11 Am. Dec. 523.

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## CAMERON v. ROBERTS.

[87 WISCONSIN, 291.]

**ARREST—PRIVILEGE FROM.**—PARTIES AND WITNESSES attending in good faith any legal tribunal are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning.

This privilege extends to the service of a summons as well as to arrest. **PROCESS—EXEMPTION FROM SERVICE OF.**—There can be no valid service of a summons upon a justice of the peace while holding court, nor upon a party or witness in attendance upon, and in the presence of, the court.

ACTION of unlawful detainer was commenced by the defendant Roberts before the defendant Harrington, a justice of the peace, against the plaintiff and another. While Harrington was holding court, and Roberts was present in court as a party and witness, awaiting the trial of his cause, both were served with a summons, complaint, and injunctional order in an action in equity brought by the plaintiff, and both were restrained by said injunctional order from proceeding in the unlawful detainer action. They appeared specially in the equity action, and upon affidavits setting forth the facts above stated moved that the service be set aside. From an order denying the motion the defendants appealed.

*Turner and Timlin*, for the appellants.

*Henry L. Buxton*, for the respondent.

291 WINSLOW, J. The service should have been set aside. The service of process upon a justice while holding court, or upon a party and witness in attendance upon, and in the presence of, the court, was a contempt of court: *Cole v. Hawkins*, Andrew, 275; 1 Greenleaf on Evidence, sec. 816. "It has long 292 been settled that parties and witnesses attending in good faith any legal tribunal . . . are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning": *Larned v. Griffin*, 12 Fed. Rep. 590, and cases cited. The privilege extends to

the service of a summons, as well as to arrest: *Miles v. McCullough*, 1 Binn. 77; *Atchison v. Morris*, 11 Fed. Rep. 582; *Person v. Grier*, 66 N. Y. 124; 28 Am. Rep. 85; *Lyell v. Goodwin*, 4 McLean, 29; *Anderson v. Rountree*, 1 Pinn. 115.

The reasons for the rule are manifest. No court should be subject to such interruptions. Parties necessarily in attendance upon court should be free to attend to their duties without disturbance or fear of it. The rule is made to subserve the best interests of the public, and the due and speedy administration of justice.

By the COURT. Order reversed, and cause remanded with directions to grant the motion.

**PROCESS—PRIVILEGE FROM SERVICE OF BY SUITORS AND WITNESSES.—**

A suitor or witness, when he is in attendance upon the trial of any case in court, is exempt from the service of any writ or summons upon him: *Thornton v. American etc. Machine Co.*, 83 Ga. 288; 20 Am. St. Rep. 320, and note; but see *Capwell v. Snipe*, 17 R. I. 475, 33 Am. St. Rep. 890, where it was held that while a witness attending out of the jurisdiction in which he lived was exempt from service of process in another suit, a suitor was not so exempt. In New York, under those circumstances, both witnesses and suitors are exempt: *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770, and note. A nonresident plaintiff, who voluntarily attends court in the state in which the suit is brought, is amenable to ordinary civil process in another action: *Baisley v. Baisley*, 113 Mo. 544; 25 Am. St. Rep. 726, and note; *Baldwin v. Emerson*, 16 R. I. 304; 27 Am. St. Rep. 741, and note. See, further, the extended note to *In re Healey*, 33 Am. Rep. 717.

**ARREST—CIVIL—PRIVILEGE FROM.—**A nonresident of Rhode Island, while in attendance on a court there, is privileged from arrest on a writ issued against him in another action: *Ellis v. Degarme*, 17 R. I. 715. A nonresident, who has been brought into the state upon a requisition to answer to a criminal charge, and has been discharged, is not subject to arrest on civil process until a reasonable time has been given him to return to the state whence he was taken: *Molitor v. Sinsen*, 76 Wis. 308; 20 Am. St. Rep. 71. A resident of another state who went voluntarily into Massachusetts for the purpose of presenting to the legislature and testifying to a claim of his against the commonwealth, is privileged from arrest on civil process until he has an opportunity to return home without unreasonable delay: *Thompson's case*, 122 Mass. 423; 23 Am. Rep. 370.

## STATE v. NOYES. SAME v. ELLIOTT.

[87 WISCONSIN, 340.]

**HABEAS CORPUS—JURISDICTION.**—NOTHING LESS THAN JURISDICTIONAL DEFECTS in the proceedings can be considered, or will justify the discharge of a prisoner on *habeas corpus*.

**GRAND JURY—DE FACTO.**—The object of the *de facto* doctrine is to protect those interests of the public involved in the official acts of persons exercising the duties of an office without being a lawful officer, and the doctrine is applicable to the acts of a grand jury *de facto*.

**GRAND JURY—VALID INDICTMENTS.**—Where a legal grand jury impaneled for one term of court holds over into the next succeeding term, and at such term is recognized by the court as a lawful grand jury, it is a good and sufficient grand jury *de facto*, and indictments found by it are not void, but good and valid as against collateral proceedings, and give the court jurisdiction to issue writs of arrest and commitments.

**CERTIORARI.** The facts appear in the opinion.

*Jared Thompson, Jr., and Leopold Hammel*, for the relator.

*W. C. Williams*, for the defendant in error, Noyes.

*Hugh Ryan, Charles D. Hickox, and W. J. McElroy*, for the defendant in error, Elliott.

341 ORTON, C. J. The same questions being in both these cases, they will be considered and disposed of together. They are brought before this court by a common-law writ of *certiorari*, to review the proceedings in *habeas corpus* of 342 the judge of the circuit court of Milwaukee county, by which the defendants in error were discharged from imprisonment. The pleadings in the *habeas corpus* and the *certiorari* proceedings show the following facts:

On the last day of the October term of the municipal court of Milwaukee county, 1893, the grand jury of said court found and returned true bills of indictment against the defendants and four other persons, under section 4541 of the Revised Statutes, for having fraudulently received deposits as directors of the Plankinton Bank of Milwaukee, knowing at the time said bank to be insolvent. The defendants were detained by virtue of commitments, on failure to enter into recognizance, issued out of said municipal court after their arraignment and pleas of not guilty. There was no grand jury summoned, selected, or impaneled for the said October term of said court, but the grand jury acting for said term, and which found said indictments, was the same grand jury duly impaneled for said court at and for the previous Sep-

tember term thereof. No order was made by said court directing a grand jury for said October term, and no grand jury was summoned for said term. The said grand jury was ordered, summoned, and impaneled for said September term by an order dated August 8, 1893; and the said grand jury convened at the September term, on September 12, 1893, and entered upon the investigation leading to said indictments, but the same was not concluded during the said September term, and for such reason they continued their sittings over and into the said October term, and until the last day of said term, when the said indictments were found and duly returned. On the last day of the September term the said court adjourned to October 2, 1893, which was the first day of the October term. The same grand jury found and returned several other indictments and against other persons during said October term.

On these facts the learned judge of the circuit court discharged <sup>243</sup> the defendants, holding that said indictments were void, and that the said municipal court had no jurisdiction, therefore, to issue the writs for the arrest of the commitments for the detention of the defendants. I say that this was the ground upon which the defendants were discharged, because the want of jurisdiction in the municipal court was the only ground upon which the defendants could have been discharged on *habeas corpus*. Although this is made a question on this hearing, it is no longer an open question in this court. It has been repeatedly decided by this court that nothing less than jurisdictional defects in the proceedings can be considered or justify a discharge of the prisoner on *habeas corpus*; for errors and irregularities which do not go to the jurisdiction of the court may be inquired of on motion, appeal, or writ of error. The last paragraph of section 3428 of the Revised Statutes provides: "But no such court or officer on the return of any such writ [*habeas corpus*] shall have the power to inquire into the legality or justice of any judgment, order, or execution," etc. This is a limitation on the power of a judge or court to inquire of nothing less than jurisdictional defects in the proceedings on which the imprisonment is based. Mr. Justice Taylor, in *State v. Sloan*, 65 Wis. 647, so held after an examination of the previous cases in this court, and cited *People v. Liscomb*, 60 N. Y. 571-604; 19 Am. Rep. 211; *Ex parte Lange*, 18 Wall. 163; *Ex parte Gibson*, 31 Cal. 628; 91 Am. Dec. 546; Hurd on



Habeas Corpus, 327; *In re Perry*, 30 Wis. 268; *In re Crandall*, 34 Wis. 177; *In re Semler*, 41 Wis. 517; *Hauser v. State*, 33 Wis. 678. To these may be added: *In re Schuster*, 82 Wis. 610; *In re Graham*, 74 Wis. 450; 17 Am. St. Rep. 174; *In re French*, 81 Wis. 597.

We take it for granted that the learned judge of the court below held that the municipal court had no jurisdiction to issue the writs and commitments on which the defendants were arrested and imprisoned, on the ground that the indictments on which they were based were void, <sup>244</sup> and that the indictments were void because not found by a lawful grand jury. The decision of the court below depended, then, on the legality of the grand jury that found the indictments. That question is supposed to be before us on this *certiorari*. But, as we understand the law, the court below had no right in this collateral proceeding to inquire into the legality of that grand jury, and decide it to have been an illegal body without authority to find the indictments; nor has this court the right to so inquire and decide. We are precluded from inquiring and determining whether the body of men that acted as a grand jury in finding the indictments was a grand jury *de jure*, by the barrier the law sets up to protect the acts of that body in the interest of the public and public justice as a grand jury *de facto*. "The *de facto* doctrine, which was introduced into the law as a matter of policy and necessity to protect the interests of the public where those interests were involved in the official acts of persons exercising the duties of an officer without being a lawful officer," has its most salutary application to the acts of a grand jury, and of other official instruments of the courts which constitute judicial proceedings. The courts are supposed to select and determine the qualifications of their subordinate official instruments necessary to the administration of justice. Their acts cannot be questioned without seriously affecting the proceedings of the courts and the conclusiveness of their judgments. The grand jury in question was summoned, selected, impaneled, and sworn for the September term of the court, and held its session and did business during that term. There is no question but that it was a legal grand jury throughout the September term. On the last day of that term this same body adjourned, with the court, to the first day of the October term, and continued its unfinished business. It is contended that this body became *functus officio* as a grand jury on and after the last <sup>245</sup> day

of the September term. It was recognized by the court as a lawful grand jury, and the court received the indictments found by it, and finally discharged it from further service, and ordered the payment of its fees. The legal grand jury of the September term simply held over its term. There cannot be a more appropriate application of the *de facto* doctrine than to such a body as a grand jury *de facto* while thus holding over and doing business in the October term of the court.

This doctrine, in its application to public officers and their acts, is well understood. Its history, object, and uses are exhaustively treated in the leading case of *State v. Carroll*, 38 Conn. 449; 9 Am. Rep. 409. In *People v. Petrea*, 92 N. Y. 128, an indictment for grand larceny was found by a grand jury drawn under a void statute. It was insisted, on behalf of the defendant, that the grand jury was not a lawful one or within the requirement of the constitution. On behalf of the people it was contended "that it is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted under the color of lawful authority." The following cases are cited to this principle: *People v. Dolan*, 6 Hun, 282; *Dolan v. People*, 6 Hun, 493; 64 N. Y. 485; *Carpenter v. People*, 64 N. Y. 483; *Thompson v. People*, 6 Hun, 185; *People v. Jewett*, 3 Wend. 314; *Cox v. People*, 80 N. Y. 500; *Friery v. People*, 2 Keyes, 450; *Ferris v. People*, 81 How. Pr. 145. The court said: "The objection to the constitution of the grand jury which found the indictment lies solely in the fact that they were drawn under the provisions of a void statute, etc. In all other respects the proceedings were regular. The jurors were drawn by the proper officer; they were regularly summoned and retained by the sheriff; they were recognized, impaneled, and sworn as grand jurors by the court, and as grand jurors they found the indictment; and moreover, they were good <sup>246</sup> and lawful men, duly qualified to sit as grand jurors. . . . The grand jury, although not selected in pursuance of a valid law, was selected under color of law and semblance of legal authority. . . . An indictment was found by a body drawn, summoned, and sworn as a grand jury, before a competent court, and composed of good and lawful men. The jury which found the indictment was a *de facto* jury, selected and organized under the forms of law." I cite largely from Judge Andrew's opinion, because it is in every respect applicable to the present case. In *People v. Fitzpatrick*,

66 How. Pr. 14, the indictment was found under a law void, because unconstitutional. The above language in *People v. Petrea*, 92 N. Y. 128, was approved by the two judges, and the indictment was held good and valid, because found by a grand jury *de facto*. "The grand jurors are public officers" (Jacob's Law Dictionary; Tomlinson's Law Dictionary; 7 Bacon's Abridgment, title "Office and Officers"), and they are therefore within the common doctrine, and their acts should be held valid, as those of any other officer *de facto*. In *People v. Dolan*, 6 Hun, 232, it was not known how or by whom the names of the persons summoned, sworn, and acting as grand jurors were drawn. The court said: "It is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted under color of lawful authority."

In *In re Gannon*, 69 Cal. 541, the grand jury organized in July, 1885, held over, and was not dissolved by the court until March, 1886, notwithstanding a new grand jury had been selected and returned in January, 1886. A witness refused to testify before this old grand jury, on the ground that it was not a legal grand jury. He was imprisoned for contempt, and was seeking his discharge by *habeas corpus*. The court said: "As an organized grand jury, it would be competent to act under color of lawful authority. Having been appointed to office, and having taken the oath of <sup>247</sup> office, the individual members are officers of the court, not only *de jure*, but *de facto*; and their acts are valid so far as the public rights are concerned, although the title under which they performed those acts may be questionable. An indictment found by a *de facto* grand jury is as regular as one found by a *de jure* grand jury." In *Ex parte Haymond*, 91 Cal. 545, a witness refused to testify before the grand jury on the ground that it was not a legal grand jury, and sought to be discharged from imprisonment on *habeas corpus*. The court said: "Without passing upon the question whether the grand jury before whom the petitioner was summoned to appear was impaneled in accordance with the provisions of the law relating to that subject, it is sufficient for us to say that such body has certainly a *de facto* existence." In *Dolan v. People*, 64 N. Y. 485, and in *Carpenter v. People*, 64 N. Y. 483, the legality of the jury was challenged because illegally drawn by a commission under an unconstitutional statute, and the proceedings were sustained on the ground of *de facto*

officers. In *State v. Belvel* (Iowa, Oct. 16, 1893), 56 N. W. Rep. 545, it is held that a grand jury composed of an improper number may find a valid indictment. In *Ex parte Springer*, 1 Utah, 214, the indictment was for a capital offense, and the court said: "The fact that the grand jury which found the indictment was illegal will not be considered upon the hearing of *habeas corpus*, as we conceive that we should stand upon the indictment." In reason and by analogy a person under an indictment seeking his discharge on *habeas corpus* has the same right to allege that the judge or the clerk of the court is not lawfully judge or clerk as that the grand jury is not a legal grand jury. The several members of the grand jury are officers of the court, as we have seen, and their acts should be protected by the same principle that they are *de facto* jurors. In *In re Burke*, 76 Wis. 357; it was alleged that there was no office of judge to be filled by the incumbent, but it was held that the incumbent was judge *de facto*.

§43 It would put an end to judicial proceedings if the legal title and qualifications of all judicial officers could be contested in collateral proceedings at the instance of aggrieved parties. This is a very important question, and a new one in this court. We have cited all the cases at hand, and from the high character of the courts they ought to be considered not only satisfactory but sufficient, especially when based upon such cogent and conclusive reasons. We hold, therefore, that the indictments found against the defendants are not void, but good and valid indictments, so far as this collateral proceeding is concerned, because found by a grand jury acting under color of lawful authority, and a good and sufficient grand jury *de facto*. It follows, also, that the municipal court of Milwaukee had jurisdiction to issue the writs by which the defendants were arrested, and the commitments upon which they were imprisoned, and therefore the judge of the circuit court had no cognizance of the cases to discharge the defendants.

By the COURT. The orders of the judge of the circuit court discharging the defendants are reversed, and the causes remanded, with direction to remand the defendants to the custody of the sheriff of Milwaukee county.

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HABEAS CORPUS.—That on *habeas corpus* only jurisdictional defects are available, see *State v. Kinmore*, 54 Minn. 135; 40 Am. St. Rep. 305, and note, with the cases collected.

**OFFICERS DE FACTO.**—An officer *de facto* is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: 1. Without known appointment or election, but were generally acquiesced in by the public; 2. Upon color of valid election or appointment, but where some act was omitted, such as giving a bond or taking an oath of office; 3. Where the election or appointment was void from want of eligibility of the officer appointed, or want of authority in the electing or appointing body; and 4. Where the election or appointment was under an unconstitutional law: *Walcott v. Wells*, 21 Nev. 47; 37 Am. St. Rep. 478, and note, with the cases collected.

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## DAVIS v. STEEPS.

[37 WISCONSIN, 472.]

**NOTICE—AGENCY.**—One who has prepared an abstract of title furnished by and on behalf of the vendor of land is in no sense to be regarded as the agent of the vendee, so as to charge the latter with actual notice of facts learned while engaged in preparing such abstract.

**NOTICE—JUDGMENT LIENS.**—The docket of a judgment, in order to operate as constructive notice, must contain all the essential matters required by law. And where the statute relative to the docketing of judgments requires the entry upon the book of "the name at length of each judgment debtor," the docket entry of a judgment against Edward Davis is not constructive notice of a lien on the real estate of either E. A. Davis or Edward A. Davis.

**ACTION** to obtain a perpetual injunction restraining the defendant Steeps, and the defendant Kloeckner, as sheriff, from selling certain premises described in the complaint on execution issued upon a judgment recovered by Steeps against one Edward Davis, and duly docketed against his name as Edward Davis. The legal title to the premises in question was in one E. A. Davis, who conveyed them by the same name by warranty deed to the plaintiff. At the time of the conveyance to her the plaintiff had no knowledge or information of the existence of any judgment lien against the premises, or that there was any judgment against her grantor, E. A. Davis, by that or any name whatever; but, as a matter of fact, her grantor and the said Edward Davis, against whom the judgment had been rendered and docketed, were one and the same person. Upon the sale of the premises to the plaintiff her vendor furnished an abstract of title, and the person who made it testified that he discovered no records of any judgments against E. A. Davis, but did find one against Edward Davis and one against E. H. Davis, but did not put

them on the abstract, not thinking it proper to do so. The court gave judgment granting the prayer of the complaint, and the defendants appealed

*J. W. Crozier and Thompson, Harshaw, and Davidson, for the appellants.*

*B. E. Van Keuren, for the respondent.*

<sup>474</sup> PINNEY, J. There is no ground for claiming that the plaintiff had actual notice of the existence of any judgment lien against the property of her grantor, or of any facts and circumstances sufficient to put her on inquiry in that behalf. The abstract of title was furnished by and on behalf of her vendor; and Mr. Powers, who prepared it, and in so doing discovered that there was a judgment docketed against Edward Davis, was not the agent of the plaintiff for any purpose connected with the sale and conveyance of the lot. Hence, there can be but one ground for affecting the plaintiff with notice of the existence of a judgment lien against the lot, namely, by constructive notice by matter of record appearing upon the docket of judgments in the office of the clerk of the circuit court of the county.

The docket of a judgment, in order to operate as constructive notice, must contain all the essential matters required <sup>475</sup> by law. The statute in relation to the docketing of judgments requires the clerk of the circuit court to "enter in a judgment docket, either arranged alphabetically or accompanied by an alphabetical index, in books to be provided by the county and kept by him, a docket of such judgment [among other things] containing: 1. The name at length of each judgment debtor, with his place of abode, title, and trade or profession, if any such be stated in the record; 2. The name of the judgment creditor, in like manner." It is only through the medium of a sufficient and legal docketing of the judgment that it can become a lien on the real estate of the judgment debtor; and it is the duty of the judgment creditor to see to it, if he would secure such lien, that his judgment is properly docketed, for, as against a *bona fide* purchaser for value, any material defect or omission in that respect is the fault of the judgment creditor, and the loss, if any, occasioned thereby will be regarded as his own: *Wood v. Reynolds*, 7 Watts & S. 406; *Hutchinson's Appeal*, 92 Pa. St. 186; *Johnson v. Hess*, 126 Ind. 298.

Was the name of the judgment debtor, whose true name is

Edward A. Davis, so designated upon the judgment docket by the name of "Edward Davis" as to make the judgment in question a lien on his real estate and constructive notice to subsequent purchasers? It is true that the common law, as a general rule, recognizes but one Christian name; and hence, for most purposes, the middle name or names, or the middle initial letter or letters, of a person's name, are not material, either in civil or criminal proceedings, and a variance in this respect is generally held to be immaterial. The omission or insertion of, or even a mistake in, a person's middle name or initial in a conveyance, is, as between the parties thereto, unimportant; and there can be no doubt but the judgment in this case, as between the parties, is a valid judgment against E. A. Davis or Edward A. Davis, <sup>476</sup> by whichever name he may be known or called. The authorities collected in 16 American and English Encyclopedia of Law, 114 et seq., contain numerous citations to the foregoing effect.

But the question, we think, is materially different in the case of a docket entry of a judgment, in order to make it a lien and effective as constructive notice thereof to subsequent purchasers, where the statute for that purpose requires the entry upon the book of "the name at length of each judgment debtor." In *Terry v. Sisson*, 125 Mass. 560, which was a trustee process, it was held, in accordance with numerous decisions in that state, that the middle name or initial is an essential part of the name, and that Sarah Sisson and Sarah F. Sisson were different names, and that the service upon the bank of process, as trustee of Sarah Sisson, was not sufficient notice of itself to bind the funds of Sarah F. Sisson in the hands of the bank, and that, it having paid over the funds to the latter, it could not be made liable to pay the same again to the plaintiff in the suit: *Parker v. Parker*, 146 Mass. 320. In *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729, the cases are considered at length, in this aspect of the question, in a learned opinion; and it was held that a certificate of attachment of the real estate of Henry M. Hawkins, when the name of the defendant in the writ was Henry F. Hawkins, was such a misdescription of the person sued as rendered the attachment of the real estate of the latter void. In *Wood v. Reynolds*, 7 Watts & S. 406, it was held that the omission of an initial letter in the defendant's name in the docket of judgment, which distinguishes him from others of the same name, whereby a purchaser of the defendant's real estate is deceived,



although the judgment would be binding as to the original parties to it, would be of no effect as against a purchaser; and there are many other cases in the Pennsylvania reports to the same effect. In *Hutchinson's Appeal*, 92 Pa. St. 186, it was held that the omission of a middle letter in <sup>477</sup> a name in the judgment index was fatal to a lien, and that the rule which requires the judgment index to give accurate information cannot be departed from; and very recently, in *Crouse v. Murphy*, 140 Pa. St. 335, the same ruling was repeated.

The object of the statute is that the judgment docket shall, of itself, furnish reasonably satisfactory evidence whether an encumbrance by judgment exists against the party from whom one is about to make a purchase of real estate. Here the title was in E. A. Davis, and he conveyed the lot by the same name. The docket entry of a judgment against Edward Davis was not, we think, constructive notice that there was an encumbrance against either E. A. Davis or Edward A. Davis. As already observed, the plaintiff had no notice of the actual identity of Edward Davis and E. A. Davis. We think the cases referred to establish a safe, as well as a reasonable, rule. It follows that the judgment of the county court is correct.

By the COURT. The judgment of the county court of Winnebago county is affirmed. —

**JUDGMENTS — DOCKETING — SUFFICIENCY OF.**—The names "Hesser" and "Hesse" are so dissimilar that one searching for encumbrances against the former would not be charged with notice of a judgment against the latter, nor put upon inquiry: *Ætna etc. Ins. Co. v. Hesser*, 77 Iowa, 381; 14 Am. St. Rep. 297, and note. The omission of the middle initial of the name of a judgment debtor on the index of judgments is fatal to the lien of the judgment creditor as against a subsequent *bona fide* grantee of such debtor for value and without notice who has searched the judgment record: *Crouse v. Murphy*, 140 Pa. St. 335; 23 Am. St. Rep. 232, and note. Omitting Christian names of judgment defendants in docketing a judgment, though it remains good between the parties, is fatal to the claim as regards subsequent purchasers or judgment creditors: *Ridgway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 586, and note. See the notes to *Chen v. State*, 21 Am. Rep. 181, and *Fallon v. Kehoe*, 99 Am. Dec. 350.

**ABSTRACTORS OF TITLE.—RELATION BETWEEN AND EMPLOYER:** See *Vallette v. Tedens*, 122 Ill. 607; 3 Am. St. Rep. 502.



# **ABRAMS v. MILWAUKEE, LAKE SHORE, AND WESTERN RAILWAY COMPANY.**

[87 WISCONSIN, 425.]

**CARRIERS OF LIVESTOCK—EXEMPTION CONTRACT.**—A contract for the transportation of livestock by a common carrier, so far as it attempts by stipulation therein to exempt the carrier from liability for injuries caused by its own negligence or the negligence of its agents or employees, is unreasonable, contrary to public policy, and void.

**CARRIERS OF LIVESTOCK—EXTENT OF LIABILITY.**—In the absence of any agreed valuation of livestock in the contract for its carriage, the carrier cannot limit to a fixed sum its liability for injuries caused by its own negligence, or that of its agents or employees.

**ACTION** for damages for the loss of livestock caused by reason of the defendant's negligence. The plaintiff and one Richard Abrams each owned four several horses at Harrison, Wisconsin, which they shipped upon the defendant's cars from that station to Oshkosh, a distance of about one hundred and forty miles. The written contract of shipment entered into between the parties contained the following stipulations: "The said company shall not be liable for any loss or damage or injury to said livestock from any cause whatever, whether by negligence of its agents or employees, or otherwise, except such as may result from a collision of the train, or from cars being thrown from the track, in course of transportation and it is further agreed that the owner shall load, unload, feed, water, and take care of said stock at his own expense and risk, and that he assumes all risk of injury or damage that the animals may, in any way or manner, or from any cause, sustain, except as above provided. It is further agreed that the liability of the company shall not, in any event, exceed one hundred dollars per head." The complaint alleged that, in consequence of the defendant's negligent conduct in respect to the carriage of said horses, three of them became sick and died; that two were the property of the said Richard Abrams, and the other the property of the plaintiff; and that their loss was to the damage of the plaintiff and the said Richard Abrams in the sum of six hundred and fifty dollars. Before the commencement of the action Richard Abrams sold and assigned to the plaintiff all his claim against the defendant on account of the loss of the horses, as stated, and the plaintiff became the sole owner thereof, and judgment was demanded in the sum of seven hundred dollars, with costs and disbursements. The

defendant justified under the written contract of shipment. The jury returned a special verdict to the effect that the death of the horses resulted from the negligence of the defendant, and that their aggregate value was six hundred and fifty dollars. Other facts appear in the opinion. The motion of the defendant to set aside the verdict and grant a new trial was denied by the court; and the motion of the plaintiff for judgment upon the verdict for the whole amount thereof, with costs, was also denied; and judgment was ordered to be entered in favor of the plaintiff, and against the defendant, in the sum of three hundred dollars, and costs and interest from commencement of suit. Both parties appealed.

*Felker, Stewart, and Felber, for the plaintiff.*

*Alfred L. Cary and Bradley G. Schley, for the defendant.*

400 **CASSODAY, J.** The jury found, as a matter of fact, in effect, that the horses came to their death by reason of the negligence of the defendant. The horses were transported on the defendant's car for a distance of about one hundred and forty miles, and the time occupied by such transportation was about thirty-four hours. During that time the horses had no food nor drink. According to the testimony of those in charge of the horses the defendant refused to give them any opportunity to take the horses from the car and give them food and drink, though repeatedly requested so to do; that this was particularly so at Antigo, where the car remained about eight hours; that it was also true at other places; and that there were eight other horses in the same car, and it was impracticable to give them food and water without removing them from the car. It appears that the train reached Oshkosh about six hours behind schedule time. There is expert testimony to the effect that such exposure of the horses without food or drink probably induced the disease which caused their death. We must assume, therefore, that the evidence supports the verdict to the effect that the horses came to their death by reason of the negligence of the defendant.

The defense relied upon is, that, by the written contract of shipment contained in the foregoing statement, the defendant was expressly exempted from all liability by reason of such negligence, and that the plaintiff thereby assumed all risk of such injury or damage. Such is, indeed, the contract, if we are to give literal effect to its language. In *Betts v. Farmers' etc. Co.*, 21 Wis. 80, 91 Am. Dec. 460, it was said by Dixon,

C. J., in speaking of the transportation of livestock, that, "as to this species of property, we think it competent for the carrier to contract that the owner shall assume all risk of damage or injury from whatever cause happening in the course of transportation." This proposition covers more ground than the point actually decided in that case, <sup>490</sup> but seems to be sustained by the earlier English cases, while the later English cases seem to hold a contrary doctrine: See *Richardson v. Chicago etc. Ry. Co.*, 61 Wis. 598, 599, and cases there cited. In *Morrison v. Phillips etc. Co.*, 44 Wis. 410, 28 Am. Rep. 599, the only question involved, as stated by the present chief justice, was whether the company "was guilty of any negligence, carelessness, or fault which caused or produced the injury to the property of the plaintiff," and he concluded by saying: "From all that appears in the evidence it was a mere accident, and unaccountable." *Richardson v. Chicago etc. Ry. Co.*, 61 Wis. 598, was an action to recover damages for delay in furnishing cars for the transportation of hogs. It was there pretty strongly intimated, if not directly held, that a railway company was not under the same obligations to furnish cars for, and receive, safely carry, and store, livestock as other ordinary inanimate freight, but that it might, to at least a certain extent, exact conditions upon such receipt, and limitations upon such liability. In that case the complaint was held bad on demurrer for failure to allege the customary terms or conditions and restrictions upon which the company was in the habit of receiving and shipping such livestock, or the requisite facts to create a liability under section 1798 of the Revised Statutes. In *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 872, 5 Am. St. Rep. 226, it was held that "a railroad company engaged in the business of transporting livestock, and accustomed to furnish suitable cars therefor upon reasonable notice whenever it can do so, and which holds itself out to the public as such carrier for hire upon the terms and conditions prescribed in a special written contract with shippers, is a common carrier of livestock, with such restrictions and limitations of its common-law duties and liabilities as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals under the contracts of carriage." Within the rule thus suggested it was competent for this railroad company <sup>491</sup> to stipulate with the owners of livestock that they should load, unload, feed, water, and take care of the stock at their

own expense. The contract in question contains such a stipulation. But the stipulation itself raised an implied obligation on the part of the defendant to furnish to such owners the requisite opportunities for so loading, unloading, feeding, watering, and taking care of such stock. This action is to recover damages for willfully refusing or negligently omitting to perform that duty.

The question recurs whether the defendant, by the contract of shipment, could lawfully exempt itself from liability for such negligence. This court has held that a common carrier of persons or property cannot by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud: *Black v. Goodrich Transp. Co.*, 55 Wis. 319; 42 Am. Rep. 713; *Lawson v. Chicago etc. Ry. Co.*, 64 Wis. 455; 54 Am. Rep. 634. The same rule has been applied to a passenger carried gratuitously by a railroad upon a pass containing such a stipulation: *Annas v. Milwaukee etc. Ry. Co.*, 67 Wis. 46; 58 Am. Rep. 848. So this court has repeatedly held that a telegraph company cannot, by such stipulation, relieve itself from liability for damages happening by the want of ordinary care of itself or servants: *Thompson v. Western Union Tel. Co.*, 64 Wis. 531; 54 Am. Rep. 644; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452. In the leading case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 384, Mr. Justice Bradley discussed the subject with his accustomed learning and ability, and he and the whole court reached the conclusions: "1. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; 2. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; 3. That these rules apply <sup>492</sup> both to common carriers of goods and common carriers of passengers for hire, and with special force to the latter; 4. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." In reaching such conclusions Mr. Justice Bradley said: "In regulating the public establishment of common carriers the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized

community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. . . . It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment; and to assert that he may do so seems almost a contradiction of terms": *Railway Co. v. Lockwood*, 17 Wall. 377, 378. Accordingly, it was there held, in effect, that the railroad company could not abdicate the essential duties of its employment of carefulness and fidelity as such common carrier.

The doctrine of that case has frequently been sanctioned by the same court: *Liverpool etc. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 442, and cases there cited. There are numerous adjudications in the state courts to the same effect: *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523; 60 Am. Rep. 360; *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800; *Lindsley v. Chicago etc. Ry. Co.*, 36 Minn. 539; 1 Am. St. Rep. 692; *Hull v. Chicago etc. Ry. Co.*, 41 Minn. 510; 16 Am. St. Rep. 722; *Boehl v. Chicago etc. Ry. Co.*, 44 Minn. 191; *Canfield v. Baltimore etc. Ry. Co.*, 93 N. Y. 532; 45 Am. Rep. 268; *Chicago etc. R. R. Co. v. Witty*, 32 Neb. 275; 29 Am. St. Rep. 436; *Railway Co. v. Wynn*, 88 Tenn. 320; *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 343; 1 Am. St. Rep. 721; *Galt v. Adams Exp. Co.*, McArth. & M. 124; 48 Am. Rep. 742. Some of these cases <sup>403</sup> involved the validity of such stipulation for exemption from liability in contracts for the carriage of livestock, and, while they indicate that such contract for exemption might be made as against injuries resulting from the inherent nature or propensities of the animals without fault of the carrier, yet they all hold that the carrier cannot by contract exempt itself from liability for the negligence of itself or its employees. Some of the cases cited go so far as to hold that where there is damage to the property so transported the burden is on the carrier to show that it was free from negligence.

In *Annas v. Milwaukee etc. Ry. Co.*, 67 Wis. 55, 58 Am. Rep. 848, Mr. Justice Taylor reviewed the authorities, and in effect said that this court was committed to the rules of law held in *Railroad Co. v. Lockwood*, 17 Wall. 357. The doctrine of that case seems to be in harmony with what was said in

*Richardson v. Chicago etc. Ry. Co.*, 61 Wis. 596, and *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226. Since those cases arose, and since the first was decided by this court, chapter 487 of the Laws of 1887 has been enacted, expressly requiring every railroad corporation operating a road within this state to receive and carry livestock during eight months of the year, including March and April, and prescribing the conditions upon which such stock is to be so carried; and, among other things, declaring that "said railroad company transporting such cars of livestock shall feed and water such stock as shall be unloaded under the provisions of this act at the expense of the railroad company, where such stock shall be detained by them for a longer period than six hours": Sanborn and Berryman's Annotated Statutes, sec. 1799 a.

There are numerous decisions by courts of high authority in conflict with the cases cited, but we must hold, what we regard as the better doctrine, that in so far as the contract in question attempted to exempt the company from liability by reason of its own negligence or the negligence <sup>494</sup> of its agents or employees, it is contrary to public policy and void. This really disposes of all the questions raised upon the defendant's appeal calling for consideration. There are exceptions to the admission of certain testimony as to the usual stop at Antigo, the usual time occupied for such transportation, the rules and orders of the company in respect to the shipping of livestock; but such testimony related to matters respecting which there was substantially no dispute, and, under the admitted facts in the case, they were of but very little significance. As often stated, this court cannot reverse for errors which do not affect the substantial rights of the adverse party: Rev. Stats. sec. 2829.

The court refused to allow the plaintiff to take judgment for the value of the horses as found by the verdict. In doing so the court gave effect to the clause of the contract wherein it was agreed that the liability of the company should not in any event exceed one hundred dollars per head. It will be observed that that amount is not named as the value of each horse, and the contract contains no stipulation nor agreement as to the value of the horses or any of them. In *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, the plaintiff's recovery was limited to his "agreed valuation" in the contract. The same was true in *Graves v. Lake Shore etc. R. R. Co.*, 187

Mass. 83, 50 Am. Rep. 282, where it was held "that the shipper was estopped to claim more than the agreed valuation of the goods." To the same effect: *Hill v. Boston etc. R. R. Co.*, 144 Mass. 286; *Brown v. Cunard S. S. Co.*, 147 Mass. 58; *Alair v. Northern Pac. R. R. Co.*, 53 Minn. 160; 89 Am. St. Rep. 588. But where, as here, there is an absence of any agreed valuation in the contract, and the limitation is merely as to the amount of recovery for damages caused by the defendant's negligence, the case comes within the general rule to the effect that the company cannot contract for exemption, either in whole or in part, from liability for the negligence of itself or its employees. *Supra*; <sup>495</sup> *Boehl v. Chicago etc. Ry. Co.*, 44 Minn. 191; *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 844; 1 Am. St. Rep. 721; *Weiller v. Pennsylvania R. R. Co.*, 184 Pa. St. 810; 19 Am. St. Rep. 700; *Ashendon v. London etc. Ry. Co.*, L. R. 5 Ex. Div. 190; *Dickson v. Great Northern Ry. Co.*, L. R. 18 Q. B. Div. 176. This is in harmony with the rule held in *Black v. Goodrich Transp. Co.*, 55 Wis. 319; 42 Am. Rep. 718.

It is to be remembered that the shipper and the railroad company do not contract upon equal terms. Practically, the shipper is bound to submit to whatever conditions are exacted by the carrier. To be lawful such conditions must be reasonable. A contract relieving a carrier wholly or partially from liability for damage caused by its own negligence is unreasonable. We must hold that the plaintiff was entitled to judgment for the amount of his verdict. The result is that the exceptions of the defendant are overruled, and the judgment is affirmed so far as involved in its appeal.

By the COURT. On the defendant's appeal the judgment is affirmed; on the plaintiff's appeal the judgment is reversed, and the cause is remanded, with direction to render judgment in favor of the plaintiff and against the defendant for the full amount of the verdict as damages.

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CARRIERS OF LIVESTOCK—LIMITING LIABILITY FOR NEGLIGENCE.—A common carrier of livestock cannot, by contract with a shipper, relieve itself in any manner from liability for damages arising from loss or injury resulting from its own negligence: *Chicago etc. R. R. Co. v. Witty*, 32 Neb. 275; 29 Am. St. Rep. 436, and note, with the cases collected. See, also, the extended note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213.



## GRACE v. NORTHWESTERN MUTUAL RELIEF ASSOCIATION.

[87 WISCONSIN, 562.]

**MUTUAL BENEFIT ASSOCIATION — CHANGE OF BENEFICIARY.** — Upon the return and surrender by a member of a mutual benefit association of his certificate, "for the purpose of securing a change of beneficiary," he directed the new certificate to be made payable to such person or persons as he should designate and name in his last will and testament. The new certificate was issued accordingly, but no person was ever named or designated as such beneficiary by last will, or otherwise. It was held that the attempted change of beneficiaries was incomplete, and hence ineffectual, and that the contract of insurance must be regarded as though the former certificate had never been returned and surrendered.

**ACTION** to enforce the payment of two thousand dollars as insurance. John F. Grace, father of the infant plaintiffs, became a member of the defendant association in 1887, and received a certificate of membership in which his then wife, Annie R. Grace, was named as beneficiary, and, in case she died before him, then payable to his heirs at law. In 1888, on application of said John F. Grace, the infant plaintiffs were substituted as sole beneficiaries, and the certificate therefor was placed in their possession. In 1890 said Annie R. Grace obtained a divorce from said John F. Grace, and the latter, in 1891, married the defendant, Annie L. Grace, and immediately afterward made application for a change of beneficiary, as stated in the head-note and opinion. Said John F. Grace died in 1893, and soon afterwards this action was commenced, the said Annie R. Grace, mother of the plaintiffs, being also their general guardian and guardian *ad litem*. The defendant, Annie L. Grace, demurred to the complaint; and the defendant association answered, declaring its willingness to pay over the amount of insurance to the beneficiaries or proper persons entitled thereto, and asking the court to determine the conflicting claims to the same, etc. The court sustained the demurrer of the defendant, Annie L. Grace, and decreed that she was entitled to the fund mentioned, and that she recover the same from the defendant association. The plaintiffs appealed.

*J. P. Smelker*, for the appellants.

*Aldro Jenks*, for the respondent, Annie L. Grace.

564 CASSODAY, J. It must be conceded that as the contract was prior to the attempted change, February 11, 1891,



the infant plaintiffs were the sole beneficiaries. In Mr. Grace's "application for change of beneficiary," made on that day, it is stated, in effect, that the former certificate is thereby returned and surrendered "for the purpose of securing a change of beneficiary"; and that the association, in consideration thereof, would issue and forward to him a new certificate, payable to such person or persons as he should designate and name in his last will and testament. The certificate was issued accordingly, but no person was ever designated or named as such beneficiary by last will and <sup>565</sup> testament, or otherwise. The proposed change was never in fact effected, by reason of such failure of Mr. Grace to so name or designate. Since the former certificate was so returned and surrendered for the sole purpose of securing such change, and since no such change was ever in fact effected by reason of such failure, the question recurs whether such return and surrender of such former certificate operated as a complete cancellation and extinguishment of the same, or whether such return and surrender remained inchoate, depending upon such change being made complete by such designation or naming of new beneficiaries or beneficiary.

Upon careful consideration we are constrained to hold that such return and surrender so remained inchoate and dependent. It is very much the same in principle as where attempts have been made to alter portions of a will by erasures without obliteration, and by way of substituting new words by interlineation which fail to go into effect for want of re-attestation; and hence, as there was no intent to revoke, except by way of such substitution which so failed, the courts have generally held that the attempted alteration is ineffectual: *Will of Ladd*, 60 Wis. 193, 194; 50 Am. Rep. 355, and cases there cited. See, also, *Short v. Smith*, 4 East, 419; *Soar v. Dolman*, 3 Curt. Ecc. 121; *Brooke v. Kent*, 3 Moore, P. C. 334; *In re Parr*, 6 Jur., N. S., 56. So here we must hold that the attempted change of beneficiaries was left incomplete, and hence ineffectual; and that the contract of insurance must be regarded the same as though the former certificate had never been returned and surrendered.

By the COURT. That part of the judgment in favor of the defendant, Annie L. Grace, and against the plaintiffs is reversed, and the cause is remanded with direction to overrule the demurrer and render judgment in favor of the plaintiffs for the fund of nineteen hundred and eighty-five

dollars, so held by the defendant ~~and~~ association for the rightful owner as mentioned; but no costs are to be awarded against the association, either in this court or the trial court.

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**MUTUAL BENEFIT ASSOCIATIONS—CHANGE OF BENEFICIARIES.**—Where an insured member in a mutual benefit society has in good faith attempted to comply with the mode prescribed for changing his beneficiary, but, owing to circumstances beyond his control, the change is not entirely consummated at the time of his death, equity will sometimes treat the substitution as complete: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260, and note. See on this subject the extended note to *Bankers' etc. Assn. v. Stepp*, 19 Am. St. Rep. 786, and the note to *Union Mut. Assn. v. Montgomery*, 14 Am. St. Rep. 526.

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## THORESEN v. LA CROSSE CITY RAILWAY CO.

[57 WISCONSIN, 567.]

**STREET RAILWAYS—DUTY OF CARDRIVER.**—It is the duty of the driver of a street-car to exercise the highest degree of care to avoid any collision or accident, especially at street crossings. He should exercise all the care that prudence may suggest in looking about and listening to assure himself that his track is clear and safe, and for failure to do so his employer is responsible.

**STREET RAILWAYS—CITY ORDINANCE.**—A city ordinance which gives priority of passage to a street-car when met or overtaken by any other vehicle, does not give the driver of the car any right to ignore or disregard the presence of other vehicles on the street, and particularly at crossings.

**STREET RAILWAYS—CROSSINGS.**—Failure on the part of a street-car driver to keep a lookout ahead, when approaching a crossing, is not excused by the fact that he was giving his attention solely to an attempted identification of another car to which he expected to change.

**CONTRIBUTORY NEGLIGENCE—NONSUIT.**—Proof of contributory negligence must be clear and decisive to warrant a nonsuit, or an absolute direction to the jury on that ground. And it was held in this case that the evidence did not show clearly and decisively that the plaintiff's intestate was guilty of contributory negligence, so as to justify a nonsuit on that ground, and that it was properly a question for the jury, in view of all the facts and circumstances disclosed.

**ACTION for damages for wrongfully causing the death of the plaintiff's intestate.** As alleged in the complaint, the deceased was traveling in a milk-wagon in the city of La Crosse, on a dark and rainy evening in the month of October, and, while crossing at the intersection of two streets in said city, her wagon was struck and overturned by a street-car of the defendant company, and she was thrown to the ground, receiving injuries which resulted in her death. The defendant was charged with negligence in causing its car to approach

and rapidly pass said crossing, and in failing to warn the deceased of the approach of said car. The defendant denied the charge of negligence on its part, and alleged contributory negligence on the part of the deceased, and at the close of the testimony the court granted judgment of nonsuit. The plaintiff appealed. It appeared that the deceased, at the time of the accident, was accompanied by a boy, Harold Wold, about thirteen years of age, who testified on behalf of the plaintiff, in substance, as follows: That they were going easterly along King street across Fourth street, and saw street-cars on the track on the latter street, one about half a block south of King street, and one crossing King street, going south, and it seemed as if the one about half a block south was standing; that they crossed the street just as quick as the car going south passed them, and did not then look at the other car—the one standing; that when they got on the first track they saw the standing car coming very fast, and that the driver of the car was looking back, and the witness did not see him try to stop the car; that when they got to the first track the car was about two rods off, and when they were on the last track the car struck the wagon, and they were tipped out on Fourth street just below the crossing. It was shown that the tracks in Fourth street at the point in question were about thirteen feet in width. Evidence produced by the defendant tended to show that the car going south met and passed the north-bound car about one hundred and twenty feet south of King street, and that the driver of the latter car started up, and went but a few steps, and the horse of the plaintiff's intestate was there, the two horses facing each other, and that the car-horse did not walk fast. The driver of the car testified that there was a good bell on the horse, and that the night was very dark, so dark that he could not see any thing. The evidence was conflicting as to whether the intestate was driving directly across King street or south along Fourth street. An ordinance of the city of La Crosse, giving priority of passage to the defendant's cars when met or overtaken by any other vehicle, was put in evidence. Other facts appear in the opinion.

*M. Bergh, Bleskman, and Bloomingdale, for the appellant.*

*Losey and Woodward, for the respondent.*

603 PINNEY, J. The evidence in this case, we think, was such as to require the submission of the case to the jury.

The testimony on the part of the plaintiff tended very clearly to show that the defendant, by its cardriver, was negligent in the conduct and management of its car, under the circumstances as described by the witness Harold Wold, and there are some facts and circumstances that tend to corroborate this view. There is no doubt that the driver looked at, and back towards, the south-bound car; but there is a decided conflict of evidence as to the relative positions of the wagon and his car, and the distance they were apart at the time. Undoubtedly the driver had a right to look for the car to which he expected to change; but his right in this respect was relative and not absolute. The evidence shows that the intersection of these streets was a much frequented place in the city, and the evening was dark and rainy. The single-horse street-car had only <sup>604</sup> two or three passengers aboard, and, like other vehicles, had a common right of passage in the street, but was necessarily confined to its track; and it would seem, from the ordinance in evidence, that it had priority of passage when met or overtaken by any other vehicle. The driver of the car had, however, no right to ignore or disregard the presence of other vehicles on the street, and particularly at the crossing. The authorities cited by the appellant's counsel show that it is the duty of a driver to exercise the highest degree of care to avoid any collision or accident, especially at street crossings, and that he should exercise all the care that prudence may suggest in looking about and listening to assure himself that his track is clear and safe, and for his failure to do so his employer is responsible: *Heucke v. Milwaukee City Ry. Co.*, 69 Wis. 401; *Collins v. South Boston R. R. Co.*, 142 Mass. 301; 56 Am. Rep. 675; *Baltimore etc. R. R. Co. v. McDonnell*, 43 Md. 584, 553; *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 492; 18 Am. St. Rep. 525. The company was bound to exercise its rights and privileges with a proper regard to the rights and safety of others lawfully using the street; and on the occasion in question the driver should have kept a lookout and exercised a proper degree of caution, in approaching the crossing, in this respect. He ought not to have given his attention solely to an attempted identification of his car. The duty which the company and its employees owe to the public is paramount to that which they owe to each other: *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 493; 18 Am. St. Rep. 525. It is the duty of the company and its employees to the

public to seek to avoid accidents where they are likely to occur, instead of omitting the reasonable precautions that the situation and circumstances naturally and fairly suggest. It is evident that a car proceeding as slowly as the one on the present occasion could have been easily and readily stopped. There is evidence tending to show that the driver, when he ought to have been keeping a lookout ~~cos~~ ahead, was looking behind, and that he did nothing to stop the car. Although there is evidence to support a contrary contention, we forbear to remark upon it, for the obvious reason that the truth of the matter is for the consideration of a jury, subject to the power of the court to set aside any verdict not warranted by the evidence.

In order to justify the court in taking a case from the jury, the question must be wholly one of law; for if it depends upon controverted facts, upon what facts the evidence establishes, the credibility of witnesses, or what inferences or conclusions should be drawn from the testimony, then it is clearly a question of fact for the jury: *Langhoff v. Milwaukee etc. Ry. Co.*, 19 Wis. 496; *Nelson v. Chicago etc. Ry. Co.*, 60 Wis. 320; *Hill v. Fond du Lac*, 56 Wis. 242; *Valin v. Milwaukee etc. R R. Co.*, 82 Wis. 5, 6; 33 Am. St. Rep. 17. The rule is well settled that proof of contributory negligence must be clear and decisive in order to warrant a nonsuit or an absolute direction to the jury on that ground. "When circumstances leave the inference of contributory negligence in doubt, and the court is unable to say that, upon the most favorable construction which can be given to the evidence for the plaintiff, there is nothing to submit to a jury, a nonsuit is improper": *Ewen v. Chicago etc. Ry. Co.*, 38 Wis. 613, 628. In *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 568, it was held that: "The question of contributory negligence is one eminently proper for a jury to determine; and when the evidence does not clearly and indisputably show such negligence or want of care on the part of the plaintiff, so as to leave nothing to submit to the jury on the opposite theory or position, a nonsuit should not be granted": *Langhoff v. Milwaukee etc. Ry. Co.*, 19 Wis. 489; *Besser v. Chicago etc. Ry. Co.*, 45 Wis. 483.

Whether, upon all the facts within the observation of the deceased, she reasonably came to the conclusion that she could cross the tracks of the street railway company we ~~cos~~ cannot know, except from the testimony of the boy Harold Wold, and his estimate of distances may not be entirely accu-

rate; and in the rain and darkness the deceased may not have been able to judge accurately. Without commenting upon the evidence we think, under the facts and circumstances disclosed, that it was a question for the jury to say whether the deceased was driving directly across Fourth street or directly down it towards the approaching car, and that the court could not properly say, under the evidence, as a matter of law, that it was negligence which ought to prevent a recovery for her to attempt to cross the tracks, about thirteen feet in width, at an estimated distance of two rods in advance of a single-horse street-car, proceeding at a very moderate pace. The evidence, in many respects, is uncertain and confusing; and the case is one peculiarly for the experience and practical knowledge of a jury, to weigh and give proper effect to the evidence and draw just inferences and conclusions, in view of all the facts and circumstances of the case. We do not think that the evidence shows clearly and decisively that the deceased was guilty of contributory negligence, so as to justify a nonsuit on that ground, and for these reasons the judgment appealed from must be reversed.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

NEWMAN, J., took no part.

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**STREET RAILWAYS—INJURY TO PERSONS ON STREET—DUTY OF DRIVER.** The driver of a street-car must be in a place and condition to exercise a reasonable degree of care and diligence in watching the street ahead of him; so as to prevent collisions and avoid injury to pedestrians lawfully traveling thereon: *Anderson v. Minneapolis etc. Ry. Co.*, 42 Minn. 490; 18 Am. St. Rep. 525. It is the duty of the gripman of a street railway car to keep his eyes on the track before him, and not to gaze at other objects while the car is in motion, and, if an accident occurs through his failure to do this, his employer is answerable: *Schnur v. Citizen's Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 680, and note. This question is fully discussed in the extended note to *Western Paving etc. Co. v. Citizen's etc. R. R. Co.*, 25 Am. St. Rep. 481.

**CONTRIBUTORY NEGLIGENCE—WHEN A QUESTION OF LAW.**—A court will not relieve from liability, on the ground of contributory negligence, a defendant guilty of a flagrant violation of a law or municipal regulation, where the evidence does not make out a clear case of such negligence: *Bluedorn v. Missouri Pac. Ry. Co.*, 108 Mo. 439; 32 Am. St. Rep. 615. Contributory negligence never becomes a question for the court unless the case is a very clear one and presents some decisive act in regard to the effect of which ordinary minds cannot differ: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403, and note. Where contributory negligence appears without any conflict of evidence from the plaintiff's own case or the cross-examination of his wit-

nesses, it is the duty of the court to take the case from the jury: *Weber v. Kansas City etc. Ry. Co.*, 100 Mo. 194; 18 Am. St. Rep. 541, and note; *Nesbitt v. Greenville*, 69 Miss. 22; 30 Am. St. Rep. 521, and note. A case involving due care on the part of the plaintiff should be withdrawn from the jury only when there is an entire absence of any facts to authorize the inference that the plaintiff was conducting himself with reasonable prudence or discretion: *Fox v. Sackett*, 10 Allen, 535; 87 Am. Dec. 682, and note. See, also, the note to *Valin v. Milwaukee etc. R. R. Co.*, 33 Am. St. Rep. 28.

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## LOBERG v. TOWN OF AMHERST.

[87 WISCONSIN, 634.]

**PUBLIC HIGHWAY—DEFECTS OR OBSTRUCTIONS IN.**—Ditches or gutters on the sides of highways designed and convenient for drainage, with walks in the nature of bridges across the same, for the use of pedestrians, leaving unobstructed the traveled portion of the road, cannot be considered as defects or obstructions in the highway.

**PUBLIC HIGHWAY—ABUTTING OWNERSHIP—EVIDENCE.**—Evidence of one's occupation and use of premises, in front of which he had placed building materials, is presumptive evidence of his ownership of the premises so as to make him an abutter on the highway, with the rights of an abutting owner.

**PUBLIC HIGHWAY—RIGHTS OF ABUTTER ON.**—An abutting owner on a public street or highway has a right to use temporarily a reasonable portion thereof for the deposit of mortar-boxes, etc., while necessarily used in plastering his house, and, although he might be able to use his yard or garden for the purpose, he is not bound to do so at the peril of injuring his shrubbery or plants, and may insist upon his rights as an abutting owner.

**PUBLIC HIGHWAY—REASONABLE USE OF.**—The question of reasonable necessity and use of the margin of a highway by an abutting owner is ordinarily one for the jury, and usually arises where a larger portion is occupied than is deemed fairly necessary for the purpose, or its use is claimed to have been unreasonably prolonged. But where, under conceded facts, no more space was used than was actually occupied by two mortar-boxes of ordinary size, a barrel of lime and some sand, and there is no claim that the use was prolonged for an unreasonable time, the question is one for the court, and the case ought not to be submitted to the jury.

**PUBLIC HIGHWAY—LIABILITY OF TOWN.**—A town cannot be held liable for injuries resulting from the fright of a horse caused by the presence of building materials in the highway, although of such a nature as to frighten horses of ordinary gentleness, unless an unlawful or unreasonable use was being made of the highway in placing them there, of which fact the town authorities had notice.

**ACTION** for damages for injury sustained by reason of alleged defects in a highway of the defendant town. The said highway had been turnpiked through the village of Amherst,



leaving a ditch or gutter on the west side thereof, about eight or ten feet wide, which was filled with water for a considerable part of the year. A plank crosswalk, substantially in the nature of a bridge, passed over the ditch or gutter opposite the house of one Jensen, who built it as a means of enabling him and others who lived on the east side of the road to cross to the sidewalk on the west side of the road. Two days before, and at the time the accident occurred, there were, on the east side of the road, between the sidewalk and the traveled part of the road in front of Jensen's house, two mortar-boxes, about the ordinary size, a barrel of lime, and some sand, all nearly opposite the crosswalk, and all placed there for use in plastering rooms in Jensen's house. The plaintiff claimed that these objects were likely to frighten horses traveling along the road, and that the town authorities knew these facts, and it appeared that the overseer of the district saw the boxes in front of Jensen's the day before the accident. The accident occurred at said crosswalk, and there was no evidence to show that Jensen owned the premises occupied by him opposite the place of the accident, other than his possession and use thereof, nor that he had any permission from any one to place the mortar-boxes where he did. As stated by the plaintiff and another who was riding with him, they were passing along the said highway with a single horse and buggy, and reached the vicinity of the accident about noon, the plaintiff driving; that when they arrived by the village schoolhouse, on the east side of the highway, all the children came out, and the horse started up a little fast, but was not scared until he came to the little bridge or crosswalk; that the horse then looked at some lime-boxes on the opposite side, made several jumps, and shied with the buggy out of the road, when the wheel of the buggy struck the crosswalk, throwing the plaintiff out, whereby he sustained very serious personal injury. Other facts appear in the opinion. The plaintiff's offer, after the close of the testimony, to prove that the mortar-boxes could have been placed in Jensen's yard as conveniently as on the margin of the highway, was overruled, and a verdict directed for the defendant. From a judgment entered thereon the plaintiff appealed.

*'Raymond, Lamoreux, and Park, for the appellant.*

*.Cate, Jones, and Sanborn, for the respondent.*



640 PINNEY, J. 1. The uncontradicted evidence makes it very plain that the crosswalk extending from the western portion or side of the highway, turnpiked up as it was, over the so-called depression, gutter, or ditch, was in no just or proper sense an obstruction or defect in the highway in question. In respect to the manner of its construction, its situation and location with reference to the sidewalk on the west side of the highway and somewhat above it and the ditch beneath it, as well as the highway itself, there is no question or controversy. There was no question to be submitted to the jury in reference to this so-called crosswalk or bridge. It was clearly a public convenience and a reasonable necessity in the use of the road and sidewalk along it for those living on and along the east side of the highway, or who desired to cross over from thence to the sidewalk and pass upon it, either south into the village or north to or near the village school. It was substantially like the crosswalks in general use over gutters and ditches along streets in cities and villages and ordinary highways where crosswalks are needed. It was not likely to form any hindrance, inconvenience, or delay to any one traveling along or upon the turnpiked portion of the highway, or to any part of it designed and fitted for travel with ordinary vehicles; and the highway at this point, as turnpiked and in its ordinary condition for use, was of ample width. The ditch over which the crosswalk extended was designed and convenient only for drainage, and the crosswalk was a legitimate and proper convenience to enable pedestrians to cross it. It had been in use for two years and a half, so far as appears, without complaint, and with the presumed sanction at least of the town officers. Ditches or gutters, with walks across the same for the use of pedestrians, are of such common necessity and general use that they cannot be considered as defects or obstructions in the highway. As it has been repeatedly held, the town 641 is not bound to fit and maintain the highway for use and travel in its entire width, nor is it an insurer of the safety of the persons and property of travelers along it. Its liability is founded only upon some fault or negligence on the part of the town, and a finding that the crosswalk or bridge in question was a defect or obstruction, in view of the description of it by the plaintiff and his witnesses, would be manifestly without proper evidence to support it.

2. Assuming that the cause of the fright of the horse which

resulted in the injury to the plaintiff was solely the presence of the mortar-boxes, etc., on the opposite side of the highway, in front of Jensen's house, and that these objects were likely to frighten horses of ordinary gentleness driven on and along the highway, yet we think that the evidence wholly fails to show that the defendant town is liable for the damages which ensued. We think the evidence of Jensen's occupation and use of the premises, and his acts of ownership over them, in front of which he had placed the boxes, was presumptive evidence of ownership of the premises, so as to make him an abutter on the highway, with the rights of such, whether he owned the fee to the center or only to the margin. As such, he had a right to use temporarily a reasonable portion of the street for the deposit of the mortar-boxes, etc., while necessarily used in plastering his house. This right is born of necessity and justified by it. But the necessity need not be absolute. It is enough if it is reasonable, and this temporary use of the margin of the highway by him for that purpose was lawful. As fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time; and, because building is necessary, materials proper and adapted to that purpose may be placed in the street, provided it be done in the most convenient manner; and so, as to the repairing of a house, the public must submit to the inconvenience necessarily <sup>643</sup> incident thereto, but, if prolonged for an unreasonable time, such use of the street becomes unlawful: *Hundhausen v. Bond*, 36 Wis. 29; *Raymond v. Keseberg*, 84 Wis. 302; *Callanan v. Gilman*, 107 N. Y. 360, 365; 1 Am. St. Rep. 831; *Clark v. Fry*, 8 Ohio St. 373, 374; 72 Am. Dec. 590.

The question of reasonable necessity and use is ordinarily one for the jury, and usually arises where a larger portion of the street is thus occupied than is deemed fairly necessary; or its use is claimed to have been unreasonably prolonged, but where the facts are not disputed, as in this case, and no more space was occupied on the margin of the highway than was actually occupied by the two mortar-boxes, etc., and there is no claim that the use had been unreasonably prolonged, the case ought not to be submitted to the jury to find, perchance, a verdict which would be a denial of the legal right under conceded facts, and which it would be the duty of the court to set aside.

Although Jensen might possibly or probably have been able

to use the mortar-boxes in his yard or garden we do not think he was bound to do so at the peril of injuring his shrubbery or plants, or that he was precluded on that account from the exercise of his rights as an abutter on the highway. The offer of proof on that point was made after the testimony in the case had been closed, and it was discretionary with the court whether it should be received, and it was not error to reject it. Had it been received it could not have affected Jensen's right to have used the margin of the highway as he did.

In *Cairncross v. Pewaukee*, 78 Wis. 70, it was pointed out that: "The purpose for which a thing is in the street must and does determine in many cases whether it is there rightfully or not. Take the case of *Bloor v. Delafield*, 69 Wis. 273, where the court held that the mortar-box was an obstruction in the highway when placed within the way as a place of temporary deposit merely; yet, if such mortar-box <sup>642</sup> had been placed on a wagon and carried along the highway for the purpose of being transported from one place to another, it might have been equally an object in the way which would naturally frighten horses, but there can be no doubt that in such case it would have been rightfully in the way, and neither the owner nor the town would have been liable for an injury resulting from its being there. . . . The liability of a town or other municipality for permitting objects which are naturally calculated to frighten teams to remain in the highway arises out of the fact that they are permitted to be there for an unlawful purpose." It is clear, upon the undisputed facts in this case, as well as upon the fact offered to be proved by the plaintiff, that the mortar-boxes, etc., in question, at the time of plaintiff's injury, were lawfully in the highway. This is in conformity with the case of *Jochem v. Robinson*, 66 Wis. 638, 57 Am. Rep. 298, and *Cairncross v. Pewaukee*, 86 Wis. 181.

8. Upon still another ground we think that the court properly directed a verdict for the defendant. There was no evidence of notice to the town authorities that an unlawful or unreasonable use was being made of the highway by Jensen, the abutter thereon, in consequence of his having placed the mortar-boxes on the margin of the street in order to plaster rooms in his house. There was nothing in their mere presence there for such a purpose to operate either as constructive notice to the town authorities, or as actual notice

to the overseer, who merely saw them there the day before the accident, that Jensen was exceeding his *prima facie* rights as an abutter on the highway, or making an unreasonable and unlawful use of it: *Cairncross v. Pewaukee*, 86 Wis. 181; *Bartlett v. Kittery*, 68 Me. 358.

For these reasons we hold that the circuit court rightfully directed a verdict for the defendant.

By the COURT. The judgment of the circuit court is affirmed.

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**HIGHWAYS—TEMPORARY OBSTRUCTION BY ABUTTING OWNER.**—The right of the owner of land abutting on a public highway to use a portion of the highway in a reasonable manner for special purposes, temporarily, is not subservient to the right of the traveling public, and its exercise without negligence imposes no liability: *North Mannheim Township v. Arnold*, 119 Pa. St. 380; 4 Am. St. Rep. 650, and note. The street in a city may be obstructed by placing building material in it for a reasonable time, if it be necessary to deposit such material in the street for want of room elsewhere: *Wood v. Mears*, 12 Ind. 515; 74 Am. Dec. 222, and note. Occupants of places of business upon a street may use the sidewalk in front of their premises in receiving and sending out merchandise, having a due care for the safety of pedestrians, and what is a reasonable length of time they may allow their property to remain upon the sidewalk without incurring the charge of negligence is a question for the jury: *Vallo v. United States Express Co.*, 147 Pa. St. 404; 30 Am. St. Rep. 741, and note. See the further discussion of this question in the extended note to *Callanan v. Gilman*, 1 Am. St. Rep. 840, and the note to *Clark v. Fry*, 72 Am. Dec. 599.

**HIGHWAYS.—OBSTRUCTIONS FRIGHTENING HORSES:** See *Schaeffer v. Jackson Township*, 150 Pa. St. 145; 30 Am. St. Rep. 792, and note, with the cases collected, and the extended note to *Morse v. Town of Richmond*, 98 Am. Dec. 608-612.

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## ESTATE OF KESSLER.

[87 WISCONSIN, 660.]

**MASTER AND SERVANT—SERVICES RENDERED AMONG RELATIVES.**—Where near relatives reside together as a common family, and one of them renders services to another, and the latter furnishes him board and lodging or other necessities or comforts, a presumption arises that neither party intended to receive or to pay compensation for the services rendered on the one hand, or for the board and lodging, or other necessities or comforts on the other, and the relation of aunt and nephew seems to be within the rule.

**MASTER AND SERVANT—CONTRACT FOR SERVICES.**—The relation of master and servant, or an express contract to compensate a relative for services rendered, may be established as fairly and fully by circumstantial evidence as by that which is direct.

**MASTER AND SERVANT—AGREEMENT TO PAY FOR SERVICES—EVIDENCE.—**

Evidence showing that the claimant, a nephew of the deceased, came at her request from Germany, and, though of full age, lived with her and carried on her farm, and managed her property for her until her death, a period of nearly nine years; that he had never lived with or worked for her before, and she had never occupied toward him any *quasi* parental relation, and he had never been the recipient of any thing from her by way of gift, or otherwise; that she had declared at various times to others that all her property was to go to him for his services, and that he himself expected to be compensated in that way for them, was held sufficient to sustain the finding of the trial court, that there was a contract between the parties that he should be so compensated. It was also held that the claimant was competent to testify that he rendered the services with the expectation that he would be compensated for them.

**APPEAL—VERIFY OF RECORD.—**The circuit court is charged with the duty of making up its own record, and its action in this respect, and its determination as to what transpired in court, cannot be questioned for alleged want of conformity with the truth, either on *mandamus* or appeal.

**AGREEMENT—STATUTE OF FRAUDS.—**A parol agreement to devise and bequeath real and personal property as compensation for services rendered by a relative is within the statute of frauds, as to the real estate, and, the contract being indivisible, the whole agreement fails. But in such case the relative may recover for his services what they may be shown to have been reasonably worth, and such void agreement may be shown in evidence to rebut the presumption that they were rendered gratuitously.

**CLAIM AGAINST ESTATE OF DECEDENT—DEMAND.—**Where an oral agreement to devise and bequeath property as compensation for services rendered by a relative fails, because within the statute of frauds, a cause of action, *quantum meruit*, for the services does not accrue until the death of the intestate, and demand is properly made by filing the claim against her estate for allowance.

**APPEAL—SUFFICIENCY OF EXCEPTIONS.—**Where the finding shows that interest has been allowed from too early a date, the error should be specifically pointed out, and is not available on appeal if there is merely a general exception to the finding that the plaintiff is entitled to recover a certain sum, with interest thereon from said date, and costs.

A CLAIM was presented to the county court by one Joseph Scholz against the estate of Mary Kessler, in the sum of seventeen hundred and thirty dollars, which the claimant alleged to be the reasonable value of services rendered by him for the deceased during a period of nearly nine years preceding her death, which occurred January 31, 1892. It was also alleged that said services were rendered under a contract entered into by the deceased intestate with the claimant in her lifetime, wherein she agreed to compensate the claimant at the time of her death by giving and conveying to him all her property of which she should die possessed, but that she had not, at

the time of her death, compensated the claimant in such way, or in any manner whatever. The answer of the heirs at law and distributees of the said Mary Kessler alleged that she was the aunt of the said claimant, and that he lived with her as a member of her family, and not otherwise; and also that the cause of action was barred by the statute of limitations. The claim was allowed by the county court at fifteen hundred and twenty-three dollars and twenty-seven cents, and the said heirs and distributees appealed to the circuit court. There was a trial before the latter court without a jury, and the finding of facts by the court, so far as material, sufficiently appear in the opinion. The court found as conclusions of law "that the plaintiff should recover the sum of seventeen hundred and thirty dollars, with interest at seven per cent, from January 30, 1892, to the date of the finding, with costs against the estate." Judgment was entered in accordance therewith, and the heirs and distributees of the deceased appealed. Upon the plaintiff's examination, as a witness he was asked the question, "Have you heard this complaint read?" to which, as appeared from the reporter's minutes, he answered, "Yes, sir; and it is true, too." A motion to strike out the latter portion of this answer on the ground that it was not made in an audible tone of voice, so as to be heard by the defendant's counsel, was denied by the court. Interest on the amount found due the plaintiff was computed from the time of the death of the intestate.

*C. M. Hilliard and C. A. Ingram, for the appellants.*

*S. G. Gilman, for the respondent.*

664 PINNEY, J. 1. Where near relatives by blood or marriage reside together as one common family, and one of them renders services to another, and such other furnishes him board and lodging or other necessities or comforts, a presumption arises that neither party intended to receive or to pay compensation for the services rendered on the one hand, or for the board and lodging or other necessities or comforts on the other; that they were intended as mutual acts of kindness done or furnished gratuitously. And the relation of aunt and nephew seems to be within the rule. We think, however, it is going too far to say that in order to authorize a recovery in such case there must be direct proof of an express contract for compensation. The relation of master and servant, or an express contract to compensate a relative for services ren-

dered, may be established as fairly and fully by circumstantial evidence as by that which is direct. "Proof of expectation on the one hand to render compensation, and on the other to receive it, is competent evidence, in connection with the facts and circumstances of the case, to give color to them, tending to show that such expectations ripened into a mutual understanding, an express contract": *Fisher v. Fisher*, 5 Wis. 472; *Pellage v. Pellage*, 82 Wis. 136; *Wells v. Perkins*, 43 Wis. 164; *Tyler v. Burrington*, 39 Wis. 382; *Ellis v. Cary*, 74 Wis. 177; 17 Am. St. Rep. 125.

We think the evidence sustains the finding of the circuit court that there was an understanding or contract between the parties that, if the respondent stayed with the deceased, and carried on her farm, managed her property, and took care of her until she died, he should have her property, and that his services were of the value found by the court. The claimant in this case, although a nephew of the deceased, had never lived with or worked for her until he commenced to serve her under the contract found to have existed between them, and he was at that time over twenty-one <sup>665</sup> years of age. The deceased had never occupied toward him any quasi parental relation, and it does not appear that he had ever been the recipient of any thing from her by way of gift, donation, nurture, support, or otherwise, and he certainly owed her no legal duty of assistance or support. The death of the aunt has served to close the mouth of the claimant as to any transactions or communications between them, and the respondent has necessarily been, in a large degree, compelled to make out his claim for his services rendered to the deceased during a period of eight or nine years, through the medium of her declarations or admissions made at various times to witnesses who testified in his behalf, some of which were made at times not long prior to her death. The fact is established that she sent for him to Germany, and he came at her request, and, though he had grown to man's estate, for a period of nearly nine years he continued his services, and for which she declared, in substance, at various times, that "what she had was to be his"; that "when she got done with all she had then it was all to go to Joseph," and other similar statements. She told another witness that she was going to send for Joseph, and, after he had arrived, and during the first year, that she was going to deed him her property, and



afterwards, when sick, she thought of making him a deed to avoid any trouble.

The record shows that respondent testified that the complaint, which sets out an express contract, was true. This answer was not objected to, nor was any motion made to strike it out until the next term after the action had been tried and judgment perfected on the finding, but the motion was denied. The circuit court is charged with the duty of making up its own record, and its action in this respect, and its determination as to what transpired in court, cannot be questioned for alleged want of conformity with the truth, either on *mandamus* or by appeal: *State v. Noggle*, 13 Wis. 380; *Bunn v. Valley Lumber Co.*, 63 Wis. 632, 633. The record imports absolute verity, and whatever objection might have been made to the answer has been waived or lost, and the answer must now stand as a part of the case.

The court allowed the respondent to testify, in answer to the question, "What did you expect to receive for the work you did there"? and his answer was: "Expected she would pay me well if I did my work well and stayed there until she died, and then the property was to be mine. That is what I expected." It was competent, we think, to show by his answer that he rendered the services with the expectation that he would be compensated for them, and not with the intention that they should be gratuitous. To that extent, at least, the fact did not necessarily involve any personal communication or transaction with the deceased, and was, we think, competent; but, in order to have excluded it on the ground that it involved a personal transaction or communication with the deceased, the subject should have been pursued by the appellants' counsel so far as to show that his expectation was founded upon some such communication or transaction. In so far as the answer implies that there was an express contract between them on the subject, it would seem to be incompetent, but the rejection of this part of the answer does not, in our opinion, materially affect the correctness of the finding.

We have regarded the case as within the general rule holding that the relationship existing between the parties rebuts the presumption which would exist in other cases that compensation was intended. As between remote relatives, at least, there is great reason for holding that the presumption that the services were intended to be gratuitous is relatively



weakened, especially if, as here, the parties had not previously been domiciled together: *Quigly v. Harold*, 22 Ill. App. 269. And a more liberal rule may perhaps be <sup>667</sup> applied where the evidence is such as to rebut the presumption arising from the relationship and mutual intercourse between the parties that the services were to be gratuitous, by evidence falling short of an express contract. It would seem to be doubtful, at least, whether the present case, in view of its peculiar facts and circumstances, falls within the general rule: Bishop on Contracts, sec. 223; *Hill v. Hill*, 121 Ind. 261; *Ensey v. Hines*, 30 Kan. 704; *Morton v. Rainey*, 82 Ill. 215; 25 Am. Rep. 311; *Cauble v. Ryman*, 26 Ind. 207; *Smith v. Denman*, 48 Ind. 65.

2. The agreement of the deceased to convey or devise and bequeath her real and personal property as compensation for the respondent's services was clearly within the statute of frauds (Rev. Stats., sec. 2304), as to the real estate, and, the contract being indivisible and failing in part, the whole agreement therefore fails; but the respondent may recover for his services rendered under such promise or agreement what they may be shown to have been reasonably worth, and such void promise or agreement cannot be set up as a defense to the claim, but it may be shown in evidence to rebut the presumption that the services in question were rendered gratuitously: *Ellis v. Cary*, 74 Wis. 177; 17 Am. St. Rep. 125; *Freeman v. Foss*, 145 Mass. 361; 1 Am. St. Rep. 467; *Wallace v. Long*, 105 Ind. 522; 55 Am. Rep. 222; *Schwab v. Pierro*, 43 Minn. 520, 523, and cases cited.

3. The objections that the claim was barred by the statute of limitations of six years, and that there can be no recovery in this proceeding for want of previous demand, are clearly untenable. The cause of action *quantum meruit* did not accrue until the death of the intestate, and there was then no one upon whom to make a demand. The law does not require impossibilities. There was but one way left in which to demand compensation, namely, the one provided by law and pursued by the respondent, by filing his claim against the estate of the intestate in the county <sup>668</sup> court for allowance. This brings the case clearly within the principle of the case of *Tucker v. Grover*, 60 Wis. 240.

4. It is strenuously insisted that the court erred in allowing interest on the amount found due from the time of the death of the intestate, instead of the date of presentation of the claim to the county court, but the exception to the con-

clusion of law of the circuit court, in pursuance of which the judgment was given, is too general to present that question. There is no exception specifically presenting it. The conclusion of law contains substantially three propositions, namely: 1. That the respondent is entitled to recover seventeen hundred and thirty dollars; 2. That he is entitled to interest thereon from January 30, 1892, at seven per cent per annum; 3. That he is entitled to recover costs. The first and third propositions we find to be correct; and the rule is, that, where an exception covers several propositions, it is a general one, and is not available if any one of them is correct: *Gilman v. Thiess*, 18 Wis. 528; *Musgat v. Wybro*, 33 Wis. 515; *Paggeot v. Sexton*, 23 Wis. 195; *Gillett v. Wisconsin Cooperage Co.*, 44 Wis. 463. Where the finding shows that interest has been allowed from too early a date the error should be specifically pointed out, so that the prevailing party may remit the excess and avoid the necessity and costs of an appeal: *Dean v. Chicago etc. Ry. Co.*, 48 Wis. 305.

It follows from these views that the judgment of the circuit court is correct.

By the COURT. The judgment of the circuit court is affirmed.

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**CONTRACT TO DEVISE REALTY—WHETHER WITHIN STATUTE OF FRAUDS.**—An agreement to make a devise of land in consideration of services to be rendered is within the statute of frauds: *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125, and note; *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379; likewise an oral promise by a wife to make a will in favor of her husband in consideration of land deeded by her to him is void as within the statute of frauds: *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46, and note.

**SERVICES BETWEEN RELATIVES—PRESUMPTION OF PAYMENT FOR.**—When services are rendered to each other by members of a family, or kindred, or those who stand in the place of kindred living together as one household, the law does not imply a promise to pay on the part of the recipient from the mere rendition and acceptance of such services: *Disbrow v. Durand*, 54 N. J. Eq. 343; 33 Am. St. Rep. 678, and note; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125, and note; *Murphy v. Murphy*, 1 S. Dak. 316; *Williams v. Hutchinson*, 3 N. Y. 312; 53 Am. Dec. 301, and extended note.

**AGREEMENT TO MAKE DEVISE—BREACH—RECOVERY QUANTUM MERUIT FOR SERVICES.**—If services have been performed under a parol contract in consideration of property to be conveyed by will, and a breach of the contract cannot be enforced by reason of the statute of frauds, an action will lie against the personal representative of the decedent on a *quantum meruit* to recover the value of said services: *Grant v. Grant*, 63 Conn. 530; 38 Am. St. Rep. 379, and note; *Schwab v. Pierro*, 43 Minn. 520.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ARKANSAS.**

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**WESTERN UNION TELEGRAPH COMPANY v. FELLNER.**

[58 ARKANSAS, 29.]

**TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DAMAGES.**—The negligent failure of a telegraph company to deliver a message whereby a purchase of bonds is not completed does not entitle the sender to recover more than nominal damages if the evidence fails to show that in case the purchase had been consummated the purchaser would have sold at a profit before the delay was discovered, even though the bonds advanced in price before that time.

*Clendening, Mechem, and Youmans* for the appellant.

*Rogers and Read, and B. H. Tabor,* for the appellee.

**20** **HUGHES, J.** This is an appeal from a judgment for damages against the telegraph company, for failure to deliver a message sent by the appellee, Fellner, over its line. There is a cross-appeal by Fellner.

**21** The case was tried by the court without a jury, and the court made the following findings of facts and declarations of law:

“That on the night of August 26, 1891, plaintiff delivered to defendant, in Fort Smith, Arkansas, the following message:

“‘HENRY CLEWS & Co., BROAD ST., N. Y.: Buy me 100 Burlington & Quincy common stock, and 10,000 Santa Fe incomes. Wire price. S. FELLNER.’

“That said message was an order to buy for plaintiff 100 shares Chicago, Burlington, and Quincy Railway common stock and 10,000 Atchison, Topeka, and Santa Fe income bonds; that defendant received said message, and for 75

cents paid by plaintiff agreed to transmit it to Henry Clews & Co., which it negligently failed to do; that plaintiff inquired frequently at defendant's office for answer to his message, and receiving none, on Saturday, August 29, 1891, telegraphed Henry Clews & Co., asking if they had filled his order, to which they replied by telegram that they had not; that at the time of the receipt of this message it was too late in the afternoon of Saturday for plaintiff to place his order before Monday, August 31, 1891; that plaintiff made no purchase of the stocks and bonds; that Henry Clews & Co. never received the message delivered by plaintiff to defendant on August 26, 1891; that said Henry Clews & Co. had in their hands \$2,000 belonging to plaintiff, and they had agreed with plaintiff to advance money and buy for plaintiff stocks or bonds, or both, whenever so ordered by him, charging him 6 per cent per annum on all sums advanced, they holding the \$2,000 to secure the same and prevent loss to themselves; and that if they had received the night message of August 26, 1891, they would on the following day have purchased for the plaintiff the property mentioned therein. That on Monday, August 31, 1891, the price on exchange at New York of the 100 Chicago, Burlington, and Quincy had advanced \$550 over its price on August 27, 1891, <sup>22</sup> and that the same has continued steadily to advance in price to the present time. That the 10,000 Santa Fe income bonds had advanced, on August 31st, \$312 over their price of August 27, 1891, but on September 1, 1891, they depreciated, and could have been had at the same price that they had sold for on August 27th. From September 1st, however, they had steadily increased in value to the present time. The premises considered, the court declares the law to be that, by defendant's negligence in not transmitting plaintiff's telegram, plaintiff has sustained proximate and certain damages in the sum of \$550 from his loss of a purchase of the Burlington and Quincy stock, but plaintiff has not sustained any certain damage from his loss of a purchase of the Santa Fe incomes. Wherefore, the court finds the issues for plaintiff and assesses his damage at \$550. It is, therefore, by the court considered, ordered, and adjudged that plaintiff, Samuel Fellner, do have and recover of and from the defendant, Western Union Telegraph Company, the sum of \$550, together with his costs here laid out and expended."

Is the appellee entitled to more than nominal damages?

The case of the *Western Union Tel. Co. v. Hall*, 124 U. S. 444, is very much, but not exactly, like this one. In that case the plaintiff delivered to the telegraph company for transmission the following message:

"11-9-1882.

"TO CHAS. T. HALL, EXCHANGE, OIL CITY, PA.: Buy ten thousand if you think it safe. Wire me.

"GEO. F. HALL."

(Meaning ten thousand barrels of oil.)

Through the negligence of the employees of the company the message was forwarded to Oil City without the name of the party to whom it was addressed, and the operator at Oil City had to telegraph back for the name, so that the message, which reached Oil City at 11 o'clock A. M. and would have been delivered to <sup>ss</sup> Charles T. Hall at 11:30 A. M. had it been properly sent, was not delivered till 6 o'clock P. M. of the day it was sent, before which hour the exchange had closed; in consequence of which the oil could not be purchased that day. At the opening of the exchange on the next day the price on the oil had advanced. Had the dispatch been properly sent and promptly delivered Charles T. Hall would have bought by 12 o'clock M., on the 9th of the month, the oil he was directed to buy for plaintiff at \$1.17 per barrel, but by the next day the market price of oil had advanced to \$1.35 per barrel, at which price Charles T. Hall, not deeming it advisable, did not purchase. It was not shown by the evidence whether the price of petroleum advanced or declined after the 9th of November. Here is the difference between that case and the one at bar. In this case the evidence is that the 100 Chicago, Burlington, and Quincy had advanced \$550 by August 31st over the market price on August the 27th, and that the same had continued steadily to advance in price to the time of the trial of the cause.

In the case of *Western Union Tel. Co. v. Hall*, 124 U. S. 444, above stated, Mr. Justice Matthews, speaking for the supreme court of the United States, said: "It is clear that in point of fact the plaintiff has not suffered any loss. No transaction was in fact made, and there being neither a purchase nor a sale, there was no actual difference between the sums paid and the sums received in consequence of it, which could be set down in a profit and loss account. All that can be said to have been lost was the opportunity of buying on November 9th and of making a profit by selling on the 10th, the sale on

that day being purely contingent, without any thing in the case to show that it was even probable or intended, much less that it would certainly have taken place. It has been well settled since the decision in *Masterton v. Mayor of Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38, that a plaintiff may <sup>34</sup> rightfully recover a loss of profits as a part of the damages for breach of a special contract, but in such a case the profits to be recovered must be such as would have accrued and grown out of the contract itself, as the direct and immediate result of its fulfillment. In the language of the supreme judicial court of Massachusetts in *Fox v. Harding*, 7 Cush. 516, these are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into and in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit. . . . The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on this subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of the contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last."

In the case at bar there was no contract entered into, on the appellee's behalf, for the purchase of the stocks and bonds; there is no evidence that, had the stocks and bonds been bought for plaintiff on the 27th of August, they would have been sold at a profit at any time at all, though the evidence shows that it might have been done at any time before this suit was brought. If <sup>35</sup> the appellee had bought, and had held the bonds till after the suit was brought, and there is no evidence that he would have done so, it cannot be found from the evidence that he could afterwards, or that he would, have sold for a profit, as we cannot presume that they con-

tinued to advance, or held the advance over August 31st afterwards.

We are of the opinion that the damages in this case are too remote, speculative, and contingent to warrant a recovery.

The judgment of the circuit court as to the Santa Fe incomes is affirmed; as to the Burlington and Quincy common stock it is reversed as to the \$550 damages in favor of appellee, and the cause is remanded for further proceedings.

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**TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—DAMAGES.** A message was sent by plaintiff, but not delivered by defendant, directing plaintiff's agent to buy a certain quantity of wheat to be delivered at any time in June at seller's option. Wheat fluctuated in June, but was at the close of the month less than on the day when the message should have been delivered. It was held that the court could not presume that plaintiff would have sold at the right time to make a profit had the wheat been bought, and that he was only entitled to nominal damages: *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775. The measure of damages for failure of a telegraph company to deliver a message ordering the purchase of certain stocks, which were afterwards bought under another order at advanced prices, is such advance: *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751, and note; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256; 21 Am. St. Rep. 662, and note; to the same effect see *Tyler v. Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. See the extended notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 779; *Western Union Tel. Co. v. Graham*, 9 Am. Rep. 152; *Moulton v. Kershaw*, 48 Am. Rep. 519, and *Western Union Tel. Co. v. Reynolds*, 46 Am. Rep. 731.

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## **BLOYD v. ST. LOUIS AND SAN FRANCISCO RY. CO.**

[58 ARKANSAS, 66.]

**MASTER AND SERVANT—VICE-PRINCIPALS.**—A person employed by a master and given power to superintend, control, and direct other employees engaged in the performance of certain work for the master, is, as to the men under him, a vice-principal, whatever he may be called.

**MASTER AND SERVANT—VICE-PRINCIPALS.**—A foreman of a gang of railway workmen, engaged in repairing trestles and bridges, and having power to employ and discharge such men, and to oversee and direct their work, is a vice-principal of the railway company, and it is liable for his negligence whereby one of the workmen receives an injury.

*J. D. Walker, and Crump and Watkins*, for the appellant.

*E. D. Kenna and B. R. Davidson*, for the appellee.

•• **MANSFIELD, J.** The appellant brought this action to recover damages for an injury sustained while performing labor for the appellee as one of a squad of men engaged in



sharpening and driving piles at a trestle on the appellee's road. The timber used for the piling, together with the machinery employed in the work, was carried to the trestle by a train consisting of an engine, caboose, and several flat-cars; and it was one of the duties of the appellant to assist in unloading the cars. He and the other piledrivers worked under the immediate direction and control of M. C. Munden, who was their foreman, and who had power to employ and discharge them. Munden had no power to employ or discharge the train crew; but they were also subject to his orders while actually in the field and co-operating with his men in building and repairing trestles. In a general <sup>or</sup> sense the work on trestles was done under the supervision of one Bradley, who was the defendant's superintendent of bridges. But it does not appear that Bradley was at any time present when work was going on, or that he ever personally supervised the labor of the gang, or exercised any direct control over them. Bloyd was employed by Munden, and, so far as the evidence discloses, he and the other men of the squad to which he belonged had no knowledge of any other superior or master in the service. Munden seems to have performed no labor whatever in common with the men he controlled. His business was to oversee and direct their work, and it was their duty to obey his orders.

On the day the injury complained of was received, three flatcars loaded with piles were placed in front of the engine and taken to the trestle. These cars were pushed to the north end of the trestle, where they were detached and left standing, while the engine with four flatcars behind it was backed about seventy-five yards and stopped where a part of it rested on the south end of the trestle. Bloyd and the other men were then ordered by Munden to go from the caboose to the front cars and unload them, which they did. When they had finished unloading the front cars Munden ordered them to go back and unload the cars behind the engine, and about the same time directed the trainmen to move forward one or two car lengths. The witnesses are not agreed as to whether the order to the men on the front cars to go back, and that to the trainmen to move forward, were given without a pause or not. Bloyd himself testified that he and others started back at once on receiving the order, and that, before they had gone half way to the engine, Munden ordered the train to advance. Whatever the fact may have been as to the exact time of the order



to the trainmen, the engine moved forward while Bloyd and several <sup>70</sup> others were still on the trestle between the engine and the unloaded cars; and Bloyd, who was probably not seen by the engineer, in his effort to escape was struck by the step of the engine and knocked off the trestle. He fell upon the unloaded piling, seventeen or eighteen feet below the trestle, and one of his feet was broken by the fall. This was the injury sued for, and the complaint alleges that it was caused by the negligence of Munden. The cause was pending here on appeal at the time of the passage of the act defining who are fellow-servants and who are not, approved February 28, 1893, and the question to be decided is not therefore affected by any provision of that statute.

It is not necessary to detail all the facts bearing upon the questions of negligence and contributory negligence, presented by the pleadings. Of these it is sufficient to say that if, as a matter of law, the negligence of Munden was imputable to the defendant, a verdict for the plaintiff could not have been disturbed here for the want of evidence to support it. It therefore becomes our duty to inquire whether the finding of the jury was made under a correct charge as to the relation which Munden and the plaintiff bore to each other as employees of the railway company. The facts establishing that relation are not in dispute; and the court's charge was to the effect that Munden was the fellow-servant of the plaintiff, and that the defendant was not therefore liable for his alleged negligence.

All the authorities approve the doctrine that a master is exempt from liability to his servant for an injury to the latter resulting from the negligence of a fellow-servant. But there is great diversity of opinion as to the precise facts which make one person the coservant of another, in the sense essential to the exemption: *Railway Co. v. Triplett*, 54 Ark. 289. And it seems that the courts have been inclined to determine <sup>71</sup> whether the relation exists, or does not exist, according to the circumstances of each case, as it arises, rather than to formulate any rule of general application. On the facts of this case, the material question is whether Munden was a mere foreman, overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business as to make him the company's representative. If he occupied the former position, the laborers had assumed the risk

of his negligence; but in the latter case he was a vice-principal, and if he was guilty of negligence in that capacity the company is liable: *Dobbin v. Richmond etc. R. R. Co.*, 81 N. C. 446; 31 Am. Rep. 512; *Fones v. Phillips*, 39 Ark. 39; 43 Am. Rep. 264.

In some of the adjudged cases the distinction between the relations indicated by the words "foreman" and "vice-principal" is apparently made to depend more upon the extent or magnitude than upon the nature of the work of which the offending servant has charge: *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372; *Borgman v. Omaha etc. Ry. Co.*, 41 Fed. Rep. 667; *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513; *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368. Other courts, proceeding upon what we think a sounder principle, have attached no importance to the extent of the work, but have considered only whether it was such as required a skillful or careful supervision; and, where such supervision was necessary to the safety of the laborers engaged upon the work, they have held <sup>73</sup> it was the master's duty to bestow it, and that if he appointed an agent to perform that duty he was responsible for his negligence: *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 285; 52 Am. Rep. 590; *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201; *Chicago etc. Ry. Co. v. Lundstrom*, 16 Neb. 254; 49 Am. Rep. 718; *Schroeder v. Chicago etc. R. R. Co.*, 108 Mo. 322; *Northern Pac. Ry. Co. v. Petersen*, 51 Fed. Rep. 182.

In *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 877, it was held that the conductor of a railroad train, while acting as such, and having "the right to command the movements of the train, and to control the persons employed upon it, represents the company . . . and does not bear the relation of fellow-servant to the engineer and other employees" on the same train. The rule established by that case, as it has been generally understood and applied by the federal courts, is that the relation of fellow-servants "should not be deemed to exist between two employees, where the function of one is to exercise supervision and control over some work undertaken by the master, which requires supervision, and over subordinate servant engaged in that work, and where the other is not vested by the master with any such power of direction or management": *Northern Pac. Ry. Co. v. Petersen*, 51 Fed. Rep. 182. The court from whose opinion this quotation is made has declared in another case that the rule, as thus under-

stood, "is right in principle, and is supported by the weight of authority": *Woods v. Lindvall*, 48 Fed. Rep. 62. In approving the doctrine of the same case a text writer of authority says: "What is the special attribute of the master? Is it the mere fact that he provides materials for the work, or that he selects the servants? Is it not, more than any thing else, that in him is vested the right and duty of <sup>73</sup> giving orders, and directing what work shall be done, and how it shall be done? If the master chooses to delegate this authority to some one else, on what possible principle can he be allowed to relieve himself from the responsibility of having proper orders given": 1 Shearman and Redfield on Negligence, sec. 228. By another text writer the rule of the *Ross* case is styled "the rule of humanity and justice": Beach on Contributory Negligence, sec. 331.

"The real test," says Mr. Wood, "by which to determine whether a general manager or foreman is the representative of the master, so as to make his acts the acts . . . of the master, is to ascertain whether in reference to the matter complained of his will is at the time supreme. That is, is he authorized, as to the particular work in hand, to direct and control the servants under him, as to the method of performing it, and are they bound to yield to his orders the same obedience as they are required to yield to the master himself": *Wood's Master and Servant*, 865.

In *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673, the supreme court of Missouri decided that "the conductor of a material train, having control of it and its movements, and a foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do and when to do it, are not fellow-servants of the men composing such gang." There the plaintiff's husband, who was one of the laborers under the foreman's control, was in the act of passing from one of the cars to another just as they began to move at a signal given to the engineer by the conductor, and the jar threw him between the wheels, where he received injuries resulting in his death. The evidence tended to show that the deceased was absorbed in his work, and that the train was moved without giving him any warning. Judge Black, in delivering the opinion of the court, said: "The defendant seeks to be relieved from liability in <sup>74</sup> this case on the ground that Miller lost his life by the negligence of a fellow-servant, thus invoking the rule that the defendant

is not liable to one servant for the negligence of a fellow-servant. The case made by the evidence stands on other and different grounds, as we view it. When the master gives to a person power to superintend, control, and direct the men engaged in the performance of work such person is, as to the men under him, a vice-principal; and it can make no difference whether he is called a superintendent, conductor, boss, or foreman. . . . The conductor being a vice-principal, it became his duty to give due and timely warning of his intention to move the train." And in the same connection it is said to be "one of the absolute duties of the master to use ordinary care to avoid exposing the servant to extraordinary risks." This Missouri case, somewhat like the case at bar as to part of the facts on which the decision turned, is not different in principle from many other cases that might be cited: *Schroeder v. Chicago etc. R. R. Co.*, 108 Mo. 322; *Anderson v. Bennett*, 16 Or. 515; 8 Am. St. Rep. 811; *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372; *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288; *Chicago etc. Ry. Co. v. Lundstrom*, 16 Neb. 254; 49 Am. Rep. 718; *Dobbin v. Richmond etc. R. R. Co.*, 81 N. C. 446; 31 Am. Rep. 512; *Chicago etc. Ry. Co. v. Swanson*, 16 Neb. 254; 49 Am. Rep. 718; *Cowles v. Richmond etc. R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620.

In *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, it is said that the ruling in Ross' case was made upon the ground that the conductor whose negligence caused the injury was "clothed with the control and management of a distinct department," although his management extended to only one train. In the case just cited the supreme court held that the engineer of a locomotive which was running detached from any train could not be regarded as in control of a department of the railroad <sup>75</sup> company's business so as to make him a vice-principal, although he was in charge of the engine, and the rules of the company declared that under such circumstances an engineer should be regarded as a conductor. The court distinguishes the case from Ross' case on the ground that the running of an engine, by itself, could not constitute a separate branch of service, and on the farther ground that the plaintiff, the fireman of the locomotive, was not injured by reason of his obedience to any order of the engineer. Baugh's case being thus distinguishable from the Ross case the former is not an authority against treating the defendant's

foreman, Munden, as a vice-principal. For Munden had charge of such work as might well be called a separate branch of the defendant's business, within the rule of the Ross case as that rule was explained by Judge Brewer, and applied by the court in *Borgman v. Omaha etc. Ry. Co.*, 41 Fed. Rep. 667; and here there is also evidence tending to show that the injury to the plaintiff was received in obeying the foreman's order. It is held, however, in the Baugh case that the question as to a master's liability to his servant, for the negligence of another servant, does not turn merely on the matter of subordination and control, but depends rather on whether the act of alleged negligence is done in discharge of some positive duty of the master to his servant: *Baltimore etc. Ry. Co. v. Baugh*, 149 U. S. 368.

We have seen that the supreme court of Missouri regards it as one of the master's positive duties to exercise ordinary care in avoiding the exposure of his servant to extraordinary risks: *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350; 32 Am. St. Rep. 673. And that duty, it is plain, can only be performed in many instances through a proper supervision of the work on which the servant is engaged. That Judge Cooley considers such supervision an absolute duty <sup>76</sup> is shown by the following extract from the opinion of the court, delivered by him, in *Quincy Mining Co. v. Kitts*, 42 Mich. 84: "This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation; and if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risk of his negligence. The same is true of the general supervision of his business; if there is negligence in this, the master is responsible for it, whether the supervision be by the master in person or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority." The rule thus stated is quoted and approved in *Hunn v. Michigan Cent. R. R. Co.*, 78 Mich. 513, where it was held that "a train-dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a fellow-servant

with other employees acting under his orders." In thus ruling the court said: "It is the duty of the master to supervise, direct, and control the operations and management of his business so that no injury shall ensue to his own employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations who can act only through natural persons." On the same subject the supreme court of Indiana, with reference to the liability of a railroad company for the negligence of a master mechanic, uses the following language: "It is also the master's <sup>77</sup> duty to do no negligent act that will augment the dangers of the service. In this instance Torrence was doing what the master usually and properly does when present in person, for he was commanding, and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were therefore done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place": *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372. The negligence for which the master is made liable by these decisions is that which Mr. Thompson describes as the "direct negligence of the master, or his vice-principal," where he "personally interferes, and either does, or commands the doing of, the act which causes the injury." And for this, he says, "the master is answerable for damages to the same extent as though the relation of master and servant did not exist": Thompson on Negligence, 971, 972. An application of the rule thus stated is shown by the decision of this court in *Southwestern Telephone Co. v. Woughter*, 56 Ark. 206. In that case the manager of the defendant, while personally supervising the removal of a telephone pole which appeared to be sound, though the inside was decayed, ordered a servant to climb the pole and detach the wires. The servant undertook to obey the order, and, in doing so, was thrown to the ground and injured by the breaking of the pole. It was held that, in the absence of contributory negligence on the servant's part, the defendant company was responsible for the damages he sustained, if it failed to use the means a prudent man would have employed to protect the servant from harm. "Among the duties of the servant," said the

court, "is the obligation to obey all reasonable commands of the master. In obeying the commands of the master, if he has no information or knowledge to the contrary, he has a right to presume <sup>78</sup> that the master has done and will do his duty toward him, and can rely upon the judgment and discretion of the master in its performance." It was further said that, in that case, the company "was constructively present by and through its manager, and must be held accordingly." Now, it was not the rank or title of the manager which made the company present in his person, but the authority with which he was clothed, and the duty of supervision he undertook to perform; and if an officer or agent of inferior grade had been, for the time, invested with the same power, and had undertaken to perform the same duty, the company would, we think, have been equally liable for his negligence: *Railway Co. v. Triplett*, 54 Ark. 302; *Hough v. Railway Co.*, 100 U. S. 213; *Chicago etc. R. R. Co. v. May*, 108 Ill. 288; Wharton on Negligence, sec. 235.

The business of which Munden had charge extended, it seems, to many trestles and bridges, and was clearly such as required supervision. In conducting it he exercised the powers of a master, and was charged with the performance of a master's duty to the men under his control. And if the plaintiff was injured through his negligence in attempting to obey one of his orders it does not answer the demands of justice to say that they were fellow-servants: *Taylor v. Evansville etc. R. R. Co.*, 121 Ind. 124; 16 Am. St. Rep. 372; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180. According to this view the charge of the court as to the relation existing between Munden and the parties to the suit was an error for which the judgment must be reversed.

In remanding the cause for a new trial it is necessary to observe that the fifth instruction given at the defendant's request defines the care which it was the duty of the plaintiff to exercise for his own safety in language that may be construed to require a higher degree of diligence than the law exacts. On this point, <sup>79</sup> however, it is sufficient to refer to *St. Louis etc. Ry. Co. v. Rice*, 51 Ark. 476, and to the authorities there cited.

Reversed.

The chief justice did not participate in the decision of this cause.



**MASTER AND SERVANTS—VICE-PRINCIPALS.**—In the case of *Fort Smith Oil Co. v. Slover*, 58 Ark. 168, it was decided that a foreman of a department of a business, having power to control, direct, employ, and discharge laborers working therein, is a vice-principal, and owes the same duty to them as the master would, if present, to warn them of latent risks in the employment voluntarily undertaken by them outside the line of their general employment. In *Little Rock and Memphis R. R. Co. v. Barry*, 58 Ark. 198, the court reached the determination that a train-dispatcher, who has control of the movements of the trains of a railroad company, is a vice-principal as to those engaged in operating its trains, and that the company is liable for his negligence in ordering the movements of trains, resulting in injury to a fireman employed thereon. In *Fordyce v. Briney*, 58 Ark. 206, the court held that a car inspector, empowered only to call the attention of a car repairer to defects in the cars, and to direct him what to do, is a fellow-servant of the latter when both are under the control and direction of a foreman who has charge of the business of a railroad company by which they are all employed, and the company is not liable for the negligence of the car inspector, whereby the car repairer is injured.

In *Railway Co. v. Torrey*, 58 Ark. 217, it was decided that a foreman, though a vice-principal, if not performing a master's duty, but an act of labor in common with the laborers of an employer, under his direction and control, at the time of an accident, is a fellow-servant with them, and that, though the accident was caused by the foreman's negligence, the master is not liable, unless his own negligence as master combined with that of the foreman as a laborer to produce the injury. If, in such case, it is conceded that the foreman was a vice-principal only, and owed to the injured employee the duty of a master, it is error to instruct the jury that such employer is entitled to recover from the master, if it is shown that he was negligently ordered "by the foreman to a dangerous position, and that, occupying that position, and by reason thereof and of said order, he was injured, while he himself was exercising due care," unless the jury is also instructed, as far as practicable, as to the facts which, if proved, would make the order negligent, and these facts must be such as involved a failure to perform some duty which the master owed to his servant, such as that of exercising reasonable care to avoid exposing him to unreasonable risks or dangers, or to warn him of such dangers as he would be exposed to in obeying orders, of which the master knew, or had reason to know, that he was not apprised. In the case of *Kansas City etc. Ry. Co. v. Hammond*, 58 Ark. 324, the court determined that the question whether a railway foreman, having the control of a squad of laborers at the time one of them is injured, is acting as a vice-principal or a fellow-servant is for the jury to determine under the circumstances of the case; but the court commits error in charging that the railroad company would be liable if such foreman required the laborer to be on the track on a hand-car when, owing to his youth and inexperience, he was exposed to the danger of collision with a train running on irregular time, if that was part of the work that the injured employee was hired to do, and he understood the nature of the risk.

**MASTER AND SERVANT—VICE-PRINCIPAL.**—The authority to employ and discharge servants working under him constitutes such servant a vice-principal: *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473; 27 Am. St. Rep. 897, and note; *Harrison v. Detroit etc. R. R. Co.*, 70 Mich. 409; 19 Am. St. Rep. 180, and note; *Hussey v. Cogger*, 112 N. Y. 614; 8 Am. St. Rep. 787.



**RAILROADS—VICE-PRINCIPAL—SECTION FOREMAN.**—A railway section foreman having power to control, employ, and discharge men under him occupies the position of vice-principal as to them, in so far as they are affected by his acts: *Sweeney v. Gulf etc. Ry. Co.*, 84 Tex. 433; 31 Am. St. Rep. 71, and note; *Colorado etc. Ry. Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 28 Am. St. Rep. 388, and note. The contrary doctrine is held in *Spancake v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 184; 33 Am. St. Rep. 821, and note; *Hill v. Northern Pac. R. R. Co.*, 1 N. Dak. '336; 26 Am. St. Rep. 621, and note. See, also, the note to *Louisville etc. Ry. Co. v. Petty*, 19 Am. St. Rep. 306.

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## JAMES v. JAMES.

[58 ARKANSAS, 157.]

**NEGLIGENCE—PROXIMATE CAUSE.**—The failure of the owner of a gin to perform his contract to gin the cotton of another within a specified time is not the proximate cause of its subsequent loss by fire while at his gin. Such breach of contract is only one of antecedent events, without which the loss would not have occurred.

**ACTION** on a special contract to recover the value of certain cotton. Plaintiff delivered the cotton to the defendant on Saturday under contract that the latter would gin it on the following Monday. This he failed to do, and the cotton was burned while at his gin on the following Thursday. Judgment for plaintiff for the value of the cotton burned. Defendant appealed.

*J. C. Hawthorne*, for the appellant.

*P. H. Crenshaw*, for the appellee.

158 WOOD, J. The theory upon which a recovery is sought in this case is presented by the complaint, the testimony of appellee, and the following instruction given by the court upon its own motion: "The jury are instructed that if they believe, from a preponderance of the evidence, that the plaintiff, while acting as constable, delivered to the defendant or his agent the cotton in controversy under a contract that the defendant would gin it by a certain time, and that the defendant negligently failed or refused to gin said cotton as agreed, and that the same was thereby destroyed, they would be authorized to find for the plaintiff."

No causal relation is shown between the failure of appellant to comply with his contract to gin and the fire, which was the direct cause of the loss of the cotton. The appellee

does not seek recovery upon the ground that the bailee for hire did not use ordinary care in the preservation of the cotton, or that he negligently destroyed it. The rule of law founded in justice and common sense and of universal application, as expressed in the maxim "*Causa proxima, non remota, spectatur*," makes the first instruction as above quoted, when applied to the facts, clearly erroneous. This is the only just and correct measure of liability. True, we might say if the cotton had been ginned on Monday and carried away on Tuesday it would not have been burned on Thursday. To use language similar to that employed by Justice Battle in the case of *Martin v. St. Louis etc. Ry. Co.*, 55 Ark. 521, the failure to gin on Monday "was one of <sup>159</sup> a series of antecedent events without which the loss would not have occurred, but such failure was in no sense the proximate cause of the loss": *Denny v. New York etc. R. R. Co.*, 13 Gray, 481; 74 Am. Dec. 645; *Daniels v. Ballantine*, 23 Ohio St. 532; 13 Am. Rep. 264; *Martin v. St. Louis etc. Ry. Co.*, 55 Ark. 521; *Dubuque etc. Assn. v. City of Dubuque*, 30 Iowa, 176; *St. Louis etc. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; 15 Am. Rep. 106; *Railroad Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; 57 Am. Dec. 695.

We deem it unnecessary to pass upon other questions raised, for, if the case is presented again in the court below, it must be constructed and tried upon a different theory.

Reversed and remanded. —

**NEGLIGENCE—PROXIMATE CAUSE.**—Proximate cause is that which is a natural and continuous sequence, unbroken by any efficient intervening cause producing the result complained of, and without which that result would not have occurred: *Western Railway v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179. The question of proximate and remote cause is the subject of an exhaustive note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807.

## TOWNSLY-MYRICK DRY GOODS CO. v. FULLER.

[58 ARKANSAS, 181.]

**SHERIFFS—JUSTIFICATION UNDER PROCESS.**—In an action against an officer by the party against whom process issued, to recover for an illegal seizure, the process, if valid, constitutes a complete justification. If, on the other hand, the suit is brought by another claiming title to the property seized, under the party against whom process issued, which title is contested on the ground of fraud, the officer must, in addition to showing that he acted under such process, show that he acted under a valid judgment for or on behalf of a creditor of the judgment debtor.

**JUSTICE'S JUDGMENTS ARE ONLY PRIMA FACIE EVIDENCE OF JURISDICTION,** in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy, nor over the parties to the action.

**VOID JUDGMENTS—JUSTIFICATION UNDER PROCESS.**—In an action by a mortgagee against a sheriff to recover for an illegal seizure of goods under execution against the mortgagor while in the hands of such mortgagee, if the officer attempts to justify the seizure on the ground that the mortgage is fraudulent as to creditors, the mortgagee may prove that the justice's judgment under which the process issued is void for want of jurisdiction of the mortgagor, and upon satisfactory proof of this fact the process is no justification.

*Sandels and Hill*, for the appellant.

*D. Hon*, for the appellee.

183 BATTLE, J. This was an action instituted by the Townsly-Myrick Dry Goods Company against L. P. Fuller to recover damages. The claim was based on the following facts: On the 16th of March, 1891, D. A. Wilson, a merchant doing business at the town of Olio, in this state, being indebted to plaintiff, executed to it his promissory note for two thousand dollars, and at the same time executed, acknowledged, and delivered a mortgage, whereby he conveyed to plaintiff certain goods, wares, and merchandise to secure the payment of the note, and stated therein the conditions on which the mortgagee might thereafter take possession of them and sell the same for the purpose of paying the note. The mortgage was duly recorded. On the 15th of May, 1891, Wilson, having committed a breach of the conditions, plaintiff took possession of the mortgaged property. On the 9th of May, 1891, Israel Brothers, a justice of the peace, issued an execution on a judgment which purported to be confessed before him, in his judicial capacity, by Wilson in favor of Barton Brothers for the sum of ninety dollars; and delivered the same to the defendant, who was then sheriff, and he executed

the same in his official capacity on the 30th of May, 1891, by forcibly taking from the possession of the plaintiff a part of the mortgaged property, and selling the same at public outcry.

The facts which we have stated were proved at the trial. To justify his action the defendant introduced in evidence the judgment and execution under which he acted, both of which were subsequent to the mortgage; and attempted to show that the mortgage was executed by Wilson to defraud his creditors. To show that the <sup>184</sup> seizure of the property was wrongful, the plaintiff offered to prove that the judgment was void by the following testimony of Wilson: "Daniel Hon and Israel Brothers came to my storehouse on the 29th of April, 1891, and Hon and I went into the store and had a talk about a claim for ninety dollars that he had for collection against me in favor of Barton Brothers. I told him I could not pay it, but it was a just debt. He said something about saving costs to me, and I said I wanted to save all I could. He said he had been to see Brothers that morning, and Brothers had come to Olio with him to get his mail. Hon then went to the door, and called Brothers in. When he came in, Hon had some papers in his hand, and read over the amount of the Barton Brothers' account, and asked me if it was all right. I said it was, and a just claim. I do not remember of Brothers saying any thing about it at the time. We were standing by, or leaning on the counter in the storehouse. Five or six people were around there, but none noticing our conversation. Any of them could have been reached by raising the voice. No court was cried, no officer in attendance—nothing was said about a court. I did not know I was confessing judgment, and did not know a court was in session. I did not offer to confess judgment, and did not know one was rendered till the 9th of May, when execution was issued. Don't know whether I would have confessed judgment had I known Mr. Hon desired it or not. Hon called for pen and ink, and I got it, and went to another part of the store to wait on a customer, and nothing more was said on the subject. No summons was ever served on me in the case referred to, and I never confessed judgment in the case, unless the facts above stated constituted the same." And the court refused to allow it to introduce the testimony, and plaintiff excepted. Other testimony to the same effect was offered by the plaintiff, and excluded by the court.

<sup>185</sup> The jury returned a verdict, and the court rendered judgment thereon, in favor of the defendant; and plaintiff moved for a new trial, on the ground, among others, that the court erred in excluding testimony as before stated. To this motion the defendant filed a response, setting up the facts which were not shown in the trial, such as he claimed would estop the plaintiff from prosecuting his action. The court sustained the response, and denied the motion; and plaintiff appealed.

"Appellant's motion for a new trial does not set up any of the grounds mentioned in the 2d, 3d, and 7th subdivisions of section 5151 of Mansfield's Digest, and, therefore, no issue of fact could be made upon it." The response thereto should have been wholly disregarded, or, on motion, should have been stricken from the files of the court.

The exclusion of the testimony offered by appellant presents the only question necessary for us to consider. The underlying principle which controls its admissibility is clearly and forcibly stated by Chief Justice Dixon in *Bogert v. Phelps*, 14 Wis. 89-92, in nearly this language: "In case of an action against the officer by the party against whom process issued, the process itself, being valid on its face, constitutes a complete justification. But in case of suit by another person claiming title to the property seized, under the party against whom process issued, which title is contested on the ground of fraud, the officer must, in addition to showing that he acted under such process, show also that he acted for or on behalf of a creditor. Where he acts under process of execution, this is done by producing the judgment on which it is issued. If it be mesne process, then the debt must be proved by other competent evidence. This proof, however, is required, not because it affects the process, or is in that respect necessary to protect the officer, but because it affects the title to the property in <sup>186</sup> question. No one but a creditor can question the title of the fraudulent vendee; and hence the officer must show that the relation of debtor and creditor exists between the party against whom the attachment or execution ran, and the person in whose behalf it was issued. It is a necessary link in the chain of evidence by which the fraud is to be established": *Bean v. Loftus*, 48 Wis. 371; *Damon v. Bryant*, 2 Pick. 411; *Ames v. Sturtevant*, 2 Allen, 583; *Suydam v. Keys*, 13 Johns. 445; *Earl v. Camp*, 16 Wend. 562; *Hines v. Chambers*, 29 Minn. 7; *Cross v. Phelps*, 16 Barb. 502; *Horton v.*

*Hendershot*, 1 Hill, 118; *Maley v. Barrett*, 2 Sneed, 501; *Dunlap v. Hunting*, 2 Denio, 643; 43 Am. Dec. 763; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Sezey v. Adkinson*, 34 Cal. 346; 91 Am. Dec. 698, and note; Cooley on Torts, sec. 463; 1 Freeman on Executions, 2d ed., sec. 101.

In this case the appellee, in his official capacity, levied upon the mortgaged property by virtue of an execution in favor of Barton Brothers and against Wilson, who he claimed was the owner of the property. He attacked the mortgage to appellant as fraudulent and void. As it was valid between the parties to the same, and, if fraudulent, was only void, under the statute of frauds, as to creditors and purchasers, it was necessary for him to prove that the execution, under which he acted, was issued on a valid judgment, in order to show that he had the right to attack the title of appellant by seizing the mortgaged property; for in that way only could he show that he was representing a creditor. A void judgment is not sufficient for that purpose: See cases above cited.

Says Mr. Freeman: "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally <sup>187</sup> worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is in reference to its validity. For if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in the legislature or other department of the government, can invest it with any of the elements of power or vitality. It does not terminate or discontinue the action in which it is entered, nor merge the cause of action; and it therefore cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the same cause, either in the action in which the void judgment was entered or in some other action": 1 Freeman on Judgments, 4th ed., sec. 117.

In all adversary suits "in which a defendant does not voluntarily appear, service of process upon him in some mode authorized by law is indispensable, and if it appears, even in a collateral proceeding, that any judgment has been

rendered against one who has neither voluntarily appeared nor been served with process, it must be treated as void": *Boyd v. Roane*, 49 Ark. 397, 411; 1 Freeman on Judgments, sec. 120 a.

A domestic judgment of a court of general jurisdiction, whether the record shows jurisdiction affirmatively or is silent upon the subject, is not subject to collateral attack based upon extrinsic evidence showing want of jurisdiction. It is said "that the question of the jurisdiction of a court of record over the parties to any domestic judgment must in all collateral proceedings be determined by the record; and that the answer to this question is not, except in some direct proceedings, <sup>188</sup> instituted against the judgment, to be sought from any extraneous proof": *Boyd v. Roane*, 49 Ark. 397; 1 Freeman on Judgments, secs. 131-134. But this is not true as to the judgments of justices of the peace. They keep no unimpeachable memorial of their transactions. "Any statement in relation to jurisdiction found in their minutes is only *prima facie* evidence; in opposition to which it may be shown, by any satisfactory means of proof, that the authority of the court did not extend over the matter in controversy, nor over the parties to the action": *Jones v. Terry*, 48 Ark. 230; *Smith v. Finley*, 52 Ark. 373; 2 Freeman on Judgments, sec. 517.

In *Jones v. Terry*, 48 Ark. 230, the plaintiff sued upon a judgment recovered by him upon a promissory note before a justice of the peace. The defendant answered, and denied that the justice had ever acquired jurisdiction over his person. Upon demurrer to the answer this court said: "The defendant was not sued for the original debt. That was merged in the judgment, if there has been a valid one. And all matters which might have been litigated before the justice, save only the question of jurisdiction, are concluded by that judgment. . . . But it may be shown by extrinsic evidence, in the face of a recital in the judgment that the defendant was served with process or appeared to the action, that in fact he had no notice, and that the judgment is therefore void for want of jurisdiction."

*Smith v. Finley*, 52 Ark. 373, was an action to recover the possession of a town lot. The plaintiff claimed title by virtue of a purchase made by him at a sale under a deed of trust executed by the defendant to secure a debt, and a subsequent conveyance made in pursuance of the terms of the purchase. The defendant pleaded that the deed of trust was void for



usury. The original transaction was shown by the evidence to be usurious. A judgment by confession rendered by a justice <sup>100</sup> of the peace against the defendant for a debt secured by the deed of trust was introduced in evidence. The justice, who rendered the judgment, testified that he went with the plaintiff, who recovered the judgment, to the defendant's house, and she then, at the date of the judgment, and with the plaintiff's consent, confessed the judgment. On cross-examination, he stated that he went with the plaintiff to defendant's home, and she stated that she owed the note; but that she did not come to his office to confess judgment, and he did not see her in his office. The defendant testified that the justice merely asked her if she owed the note, and she answered "Yes"; that she did not understand that she was confessing judgment, and did not do so. The plaintiff in the action to recover the town lot insisted that she was estopped by the judgment from setting up usury. This court held that the parol testimony was admissible to show want of jurisdiction, and was conclusive of that fact, and that the judgment of the justice was, therefore, void.

In this case the appellee, in his official capacity of sheriff, seized property which was held in possession and claimed by appellant under a mortgage. Appellant denied his right to do so. Appellee responded by saying that he seized it by virtue of an execution against the mortgagor, and that the mortgage was fraudulent and void. Appellant replied that if it was fraudulent, it was valid against every one except creditors and purchasers, and that appellee did not represent either of them. Upon this they joined issue. Appellee introduced the execution and judgment of the justice of the peace upon which it was issued, both of which was subsequent to the mortgage, as an evidence of his right to attack it for fraud, in the right of a creditor. Appellant offered to prove that the judgment, though regular upon its face, was invalid—void—for want of jurisdiction of the defendant against whom it was rendered, and, <sup>100</sup> therefore, did not prove the existence of any debt or right to seize the property, and the court refused to allow him to do so. The evidence was competent, and should have been admitted.

The judgment of the circuit court is, therefore, reversed, and the cause is remanded for a new trial.

Wood, J., did not participate in the decision of this cause.



BURN, C. J., dissented. He first restated the facts of the case as understood by him; and drew therefrom the conclusion that the sole question of any importance in the case was whether the trial court erred in excluding the testimony offered to impeach the judgment, by matters *de hors* the record; or, in other words, in order to attack the plaintiff's mortgage, was the sheriff required to do more than to produce the judgment and the process upon which it was issued, or was he required to establish all the precedent facts necessary to make the judgment valid? While the judge admitted there were authorities in support of the position taken by the majority of the court, he thought that all the authorities cited did not necessarily support their position. He contended that there being a judgment valid as between the parties thereto, that it established the relations of judgment creditor and judgment debtor between them; that this judgment was one in the case before the court against which the judgment creditor had no redress by appeal or otherwise, and that as the defendant himself could not get rid of the judgment by a direct proceeding, it was not reasonable to permit another to avoid it in a collateral action. Though the judgment was rendered by a justice of the peace, there was no doubt he had jurisdiction over the subject matter of the action, and that all jurisdictional facts, whether of the subject matter or of the person, appeared by the recitals. He therefore asserted that such a judgment, while it might be voidable, was never void. This being so, it not only required proper proceedings to annul it, but it required those proceedings to be at the instance of the proper parties and against the proper parties, and in support of this position he quoted the following from section 605 of Mr. Black's work on Judgments: "One of the most important applications of the rule giving a qualified admissibility to a judgment as evidence against strangers is in the case where it is invoked as a proof of the relationship of debtor and creditor between the parties. It is now well settled upon high authority that where no fraud or collusion has been shown in the recovery of a judgment such judgment is conclusive of the fact and the amount of the indebtedness of the judgment debtor, and it cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question. . . . And a judgment obtained without fraud or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and amount of the indebtedness of the latter." The judge thus summarized his conclusions:

"It follows, from the principles suggested, that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession, or contestation, is, upon all questions affecting the title to his property, conclusive evidence against his creditors to establish: 1. The relation of creditor and debtor between the parties to the record; and 2. The amount of the indebtedness. In the present case the judgment is fair on its face, no fraud or collusion is charged or suggested as a matter of suspicion even, and the debt is a just one without question from any one, and withal the judgment stands unchallenged by Wilson, even upon the ground set up in this cause, by which it is now sought to be annulled.

"It is unnecessary to do more than merely suggest the vast difference between a want of jurisdiction of the subject matter of litigation, and that of the persons of the parties to it. The defects in the latter may be, in many instances and in various ways, waived and acquiesced in, but the former is nowhere the subject of consent. One may be precluded notwith-

standing there is defect of jurisdiction of the person, but never in the case of a want of jurisdiction of the subject matter.

"Finally, quoting from 2 Freeman on Judgments, section 529: 'But the general rule seems now to be almost universally acknowledged and enforced, that an officer, acting under process, regular and valid on its face, and issued by a court which might lawfully exercise jurisdiction over the subject matter of the action, is protected, although the court has no jurisdiction over the defendant, unless the officer had notice of the fact.' This cannot refer exclusively to cases where property in possession of defendant in execution is taken, because it is too well settled that an execution good on its face is of itself and alone a protection, without having to refer to the judgment.

"The point, as I have said, is an extremely nice one, we may say, in the last degree technical, but the view I take of it is the only one in which all the authorities can be reconciled.

"The cases cited in the opinion of the majority as having been decided by this court, it is suggested, are scarcely applicable to this case, because neither of them is purely a contest of title to the property of the common debtor, because in those cases the defendants are the direct impeachers of the judgment, and because of other differences not necessary to mention.

"I think, therefore, that the judgment in this cause should have been affirmed, as in the first instance."

**SHERIFFS—JUSTIFICATION UNDER PROCESS.**—Where the evidence in an action of replevin against an officer shows that he has taken property which did not belong to the party against whom process ran the taking is wrongful, and the process affords him no protection: *Carpenter v. Innes*, 16 Col. 165; 25 Am. St. Rep. 255, and extended note. A void execution will not justify acts done under it previous to being set aside: *Coltraine v. McCaine*, 3 Dev. 308; 24 Am. Dec. 256. A void process is no justification to a sheriff for acts committed by virtue of it, but an irregular process is: *State v. Page*, 1 Spear, 408; 40 Am. Dec. 608; *Cogburn v. Spence*, 15 Ala. 549; 50 Am. Dec. 140, and note; *Keniston v. Little*, 30 N. H. 318; 64 Am. Dec. 297. An officer will not be protected by an execution valid on its face if he have notice *aliunde* of some jurisdictional defect which may render the judgment void: *Grace v. Mitchell*, 31 Wis. 533; 11 Am. Rep. 613. This question is the subject of the monographic note to *Savacool v. Broughton*, 21 Am. Dec. 190.

**JUSTICES OF THE PEACE—PRESUMPTION OF JURISDICTION.**—Nothing is presumed in favor of the jurisdiction of a justice of the peace; it must be affirmatively shown: *Spear v. Carter*, 1 Mich. 19; 48 Am. Dec. 688, and note; *McDonald v. Prescott*, 2 Nev. 109; 90 Am. Dec. 517, and note; *Piper v. Pearson*, 2 Gray, 120; 61 Am. Dec. 438, and note. As to whether jurisdiction is presumed in favor of a justice's judgment on collateral attack, see *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646, and note.

## ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY v. HACKETT.

[58 ARKANSAS, 331.]

**MASTER AND SERVANT—OFFICER OF LAW AS PRIVATE WATCHMAN.**—An officer of the law cannot engage as such to guard the property of a private individual or corporation, and the latter cannot escape liability for his wrongful act, while acting as its night watchman, on the ground that he is such officer.

**MASTER AND SERVANT—LIABILITY FOR SERVANT'S TORTS.**—A railway company is liable in damages for any wrongful or negligent act of its night watchman performed in the course of his employment, resulting in injury to another, though he exceeds his authority.

**MASTER AND SERVANT—LIABILITY FOR SERVANT'S TORTS.**—A railway company is not liable for the wrongful act of an officer of the law while acting as its night watchman, if the act is committed in the discharge of, or in an endeavor to discharge, his duty as such officer, though he acts in excess of his authority as such.

**MASTER AND SERVANT—NOTICE OF REPUTATION OF SERVANT.**—A master is charged with knowledge of the general reputation of his servant for recklessness and unfitness for his position when such reputation is generally and commonly known, and he has held such position for a number of years.

**PRACTICE—OBJECTIONS TO EVIDENCE.**—When specific objections are made to evidence all objections not specified are waived.

**PRACTICE—IMPROPER EVIDENCE WITHOUT PREJUDICE.**—The admission of improper evidence, if not prejudicial, is not reversible error.

**ACTION to recover for personal injury.** The appellant railway company had in its employ, as night watchman, one Gallagher for about nine years, prior to and at the time the injury was inflicted. He had been appointed a deputy sheriff so as to be authorized to make arrests in connection with his duties as such watchman. On the night in question Gallagher heard a noise among the company's cars, and, proceeding to the point whence the noise came, he found the appellee standing there, and asked him what he was doing. The appellee replied that he had just attended to a call of nature. Thereupon Gallagher ordered the appellee to come along with him. The appellee replied "All right, I will go," and stepped toward Gallagher, when the latter fired a pistol at him, hitting him in the neck, and inflicting the injury complained of. Both parties were then put under arrest. Judgment for the appellee, and the railway company appealed.

The fifth instruction asked by appellant and refused by the court is as follows: "5. If the jury find from the evidence that Pat Gallagher was a deputy sheriff duly ap-

pointed; that, as such, he was engaged in guarding the property of defendant railway company at its depot in Little Rock; that the injury complained of was inflicted upon plaintiff by said Gallagher, while in the discharge of his duties as such deputy sheriff, then you are instructed that the railroad company cannot be held liable therefor, even though you should further find from the evidence that said Gallagher overstepped the bounds of his authority as such deputy sheriff, and that the railway company was paying, and had agreed to pay, the wages of said Gallagher as deputy sheriff."

*Dodge and Johnson*, for the appellant.

*S. W. Williams and G. W. Shinn*, for the appellee.

<sup>385</sup> HUGHES, J. We have endeavored to fully examine and consider each of the <sup>386</sup> instructions given by the court in this case, and it is our opinion that, taken together, they correctly state the law applicable to this case; that they contain no reversible error.

The counsel for the appellant state, in their brief, in substance, that they base the chief ground of their objection to the verdict upon the court's refusal to declare the law as stated by them in instruction numbered five, which the court refused. This instruction is erroneous, in that it assumes that a deputy sheriff, as such, might engage to guard the property of the railroad company. An officer of the law cannot engage, as such officer, to guard the property of a private individual or corporation not in the custody of the law. The duties of a sheriff are prescribed by law. Such part of this instruction as correctly states the law is covered by the instructions given by the court. There was no error, therefore, in refusing this instruction.

The fourth instruction asked for by the appellant railway company, and refused by the court, is erroneous, as it assumes that, if Gallagher inflicted the injury willfully and maliciously, the company is not liable for damages resulting from the injury. Such, in our opinion, is not the law, according to the weight of authority. The intention with which Gallagher acted cannot affect <sup>387</sup> the liability of the railway company, though it might affect the amount of the damages: *Cleghorn v. New York etc. Ry. Co.*, 56 N. Y. 47; 15 Am. Rep. 375. The question is, Was Gallagher, at the time he fired the pistol shot,

acting in the course of his employment as night watchman for the railway company? If he was, the company is liable in damages for any wrongful act of his in the course of his employment, resulting in injury to another, though he exceeded his authority as such night watchman. If the act was done by him in the service of the company, in the course of his employment, and injury resulted therefrom, the company is liable in damages resulting from the injury, if the act was wrongful, or performed in such a negligent manner that its negligent performance caused the injury.

Of course, if the act causing the injury was outside of the course of the servant's employment, disconnected with the service of the company, then the company would not be liable. The fact that Gallagher had been appointed a deputy sheriff, to enable him to make arrests, because he was watchman for the railroad company, could not exempt the company from liability for his acts as such watchman. If the act had been committed in the discharge of, or in the endeavor to discharge, his duties as deputy sheriff, though wrongful and in excess of his authority as deputy sheriff, the railroad company would not have been liable, though the deputy sheriff and his principal, the sheriff, might have been. But this case presents no such aspect: *Ward v. Young*, 42 Ark. 542; *Brill v. Eddy*, 115 Mo. 596; *Cooley on Torts*, 307; *Krulevitz v. Eastern R. R. Co.*, 143 Mass. 228; *Priester v. Augley*, 5 Rich. 44; *Wood on Master and Servant*, secs. 279, 280, <sup>288</sup> p. 543 et seq.; *Chapman v. New York etc. R. R. Co.*, 33 N. Y. 369; 88 Am. Dec. 392; *Wood on Master and Servant*, 303, 568, 571; *Weed v. Panama R. R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474; *Wood on Master and Servant*, sec. 299; *King v. Illinois Cent. R. R. Co.*, 69 Miss. 245; 2 *Wood's Railway Law*, 1206; *Green v. Omnibus Co.*, 7 Com. B., N. S., 290; *Garretzen v. Duencckel*, 50 Mo. 104; 11 Am. Rep. 405; *Nashville etc. R. R. Co. v. Starnes*, 9 Heisk. 52; 24 Am. Rep. 296.

While we do not intend to enter upon an extended discussion of the principles stated, we think that a careful examination of the authorities will sustain fully the conclusions we have reached as to the law of this case.

It is true that there has been a difference of opinion in the courts upon the question whether a master is liable at all for the willful and malicious acts of his servant, resulting in injury, under any circumstances whatever, unless where they were in violation of a contract of carriage, or done by the mas-

ter's express command; yet the better reason and weight of authority seem to be that where such acts are performed about the master's business, in the course of the servant's employment, the servant and master are both liable.

The principal case relied upon by counsel for appellant, *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, is not like the case at bar, and does not contravene the principles announced. In that case it clearly appeared that the officer who did the injury was not acting in the line of his employment, but was seeking only to enforce the criminal law, as he believed; and as he was an officer, though he had accepted private employment from the company, the company was not liable for his official acts. There is a correct line of distinction in these cases, which the circuit court seems to have followed in its instructions, leaving the questions of fact properly to the jury. It was not for the court to tell the jury that Gallagher, when he fired the shot, was or was not acting in his capacity of deputy sheriff, <sup>289</sup> or that he was or was not acting in the course of his employment by the company as night watchman. These are questions of fact for the jury to determine, and we think the evidence warrants their verdict. The instructions asked on the part of Gallagher, and refused by the court, we have not considered, as Gallagher has not appealed.

The objection to the testimony in regard to the character of Pat Gallagher, the watchman, as to recklessness and unfitness for his position, was based solely upon the ground that it was not shown that the railway company ever had any knowledge of Gallagher's reputation. It was shown that he had been in the employment of the railway company as watchman about nine years, and that his reputation was generally known, a matter of common knowledge in the county. This is sufficient to show that the company ought to have known his reputation, and to charge it with knowledge of it: 1 Wharton on Evidence, sec. 48.

Where specific objections are made to testimony all objections not specified are waived: *Evanston v. Gunn*, 99 U. S. 665. The testimony was clearly incompetent, but all objections to its competency were waived, other than the specific objection stated: *Dunham v. Rackliff*, 71 Me. 349; *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341.

The testimony of G. W. Shinn as to the absence of Hackett from the trial, and the introduction of the letter of Hackett,

were irregular, but Hackett's deposition <sup>390</sup> had been taken, and was read to the jury, and there was no proof that Hackett was in the employment of the defendant company at the time the letter was written. We cannot see that the company could have been prejudiced by this testimony and letters, and we think that, though improper, the admission of them was not reversible error.

The judgment is affirmed.

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**MASTER AND SERVANT—OFFICER OF LAW.**—An armed watchman employed by the owners of a brewery to guard their property pursued a person acting on the premises in a disorderly manner, and, while he was retreating, killed him. It was held that the employers were not liable: *Golden v. Newbroad*, 52 Iowa, 59; 35 Am. Rep. 257. As to a railroad company's liability for a wrongful arrest by one of its special officers of a passenger, see *Duggan v. Baltimore etc. R. R.*, 159 Pa. St. 248; 39 Am. St. Rep. 672, and note.

**MASTER AND SERVANT.—MASTER'S LIABILITY FOR ASSAULTS BY SERVANTS:** See the extended note to *Fick v. Chicago etc. Ry. Co.*, 60 Am. Rep. 880-884, and the note to *Evansville etc. R. R. Co. v. McKee*, 50 Am. Rep. 108.

**MASTER AND SERVANT.—MASTER'S LIABILITY FOR SERVANT'S TORTS.**—A master is liable for the torts of his servant done in the course of his employment, though done without his authority or even against his express directions: *Yates v. Squires*, 19 Iowa, 26; 87 Am. Dec. 418, and note. But a master is not liable in exemplary damages for the tort of a servant unless authorized or ratified: *Gulf etc. Ry. Co. v. Reed*, 80 Tex. 362; 26 Am. St. Rep. 749, and note. See a thorough discussion of this question in the extended notes to the following cases: *Baird v. Shipman*, 22 Am. St. Rep. 512; *Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 601; *Hoffman v. New York etc. R. R. Co.*, 41 Am. Rep. 340; *Chicago etc. R. R. Co. v. Fleckman*, 42 Am. Rep. 36; *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 192; and *Vanderbilt v. Richmond Turnpike Co.*, 51 Am. Dec. 318.

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## **LEEP v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY.**

[58 ARKANSAS, 407.]

**CONSTITUTIONAL LAW.—CONSTITUTIONALITY OF LEGISLATIVE ACTS** is to be determined solely by reference to the limits imposed by the constitution. The sole question for the courts to decide is one of power, not of expediency, justice, or wisdom, and they should resolve all doubts in favor of the constitutionality of the statutes, or, if susceptible of two constructions, one of which is valid and the other invalid, they should give to them the former, on the presumption that the legislature did not intend to exceed its power.

**CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The legislature can control to some extent the right to contract in reference to property clothed with a public interest, where used in a manner to make it



of public consequence, and affect the community at large. It can fix the maximum of charges for the storage of grain in public warehouses, and for the carriage of freight and passengers by carriers, and for services rendered, accommodations furnished, and articles sold by parties pursuing certain avocations.

**CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The legislature can deny the right to contract to those who are incapable of binding themselves thereby, or it may prohibit the making of contracts when it becomes necessary to protect the rights of others.

**CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The power of the legislature to control and limit the right to contract is always based on some condition, and not on the absolute right to control, and such right cannot be limited by arbitrary legislation resting on no reason upon which it can be defended. Such power cannot exist, as it is subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness.

**CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof.

**CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The legislature cannot restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which they are earned, or that the price of property sold shall be paid on a day subsequent to the sale. This rule does not always apply to corporations.

**CONSTITUTIONAL LAW—CORPORATIONS—LIMITATION OF POWERS.**—Corporations possess only those powers or properties which the charters of their creation confer upon them, either expressly or as incidental to their existence, and these may be modified or extinguished by the legislature by amendment or repeal of their charters.

**CONSTITUTIONAL LAW—CORPORATIONS—AMENDMENT OF CHARTER—CONTROL OF RIGHT TO CONTRACT.**—The legislature under a reserved power to amend the charters of corporations cannot take from them the right to contract; it can regulate that right when the public interest demands it, but not to such an extent as to render it ineffectual or substantially impair the object of the corporation.

**CONSTITUTIONAL LAW—CORPORATIONS—AMENDMENT OF CHARTERS.**—Whenever the charters of railroad companies become obstacles in the way of the legislature to regulate the roads so as to make them subserve the public interest, to the fullest extent practicable, their charters are, in that respect, injurious to the citizens of the state, and can be amended under a reserved power, as to defects, in such manner as is just to the corporators.

**CONSTITUTIONAL LAW—CORPORATIONS—AMENDMENT OF CHARTERS—CONTROL OF WAGE CONTRACTS.**—The legislature cannot, under reserved power by way of amendment of charters, fix or limit the compensation of employees of railroad companies, but it may require them to pay for the labor of such employees when the labor is fully performed at the end of their employment.



**CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT AS TO WAGES.**

A statute requiring corporations and persons engaged in operating and constructing railroads and railroad bridges, and contractors and subcontractors engaged in the construction of any such road or bridge, to pay their employees on the day of discharge, the unpaid wages then earned by them at the contract rate, without abatement or reduction, and, if not so paid, then, as a penalty, such wages to continue at the same rate until paid, is void as to natural persons, as an invasion of the right to acquire, possess, and protect property, but is valid as to corporations, under reserved power to alter, revoke, or annul their charters. The words "without abatement or deduction" mean without discount for paying in advance of the time fixed by the contract, and do not prevent a corporation from offsetting the damages sustained by the employee's failure to perform his contract. Such statute is not special legislation, as it is general and uniform in operation on all persons within the class to which it applies.

**JURISDICTION—JUSTICE OF PEACE.**—A statute providing that if the wages of a discharged employee are not paid him on the day of his discharge, then, as a penalty for nonpayment, such wages shall continue at the same rate until paid, means that the additional sum shall accrue as compensation for delay, and punishment in exemplary damages for failure to pay, and gives a justice of the peace jurisdiction of an action to recover the amount due under the statute to a discharged employee.

*Marshall and Coffman*, for the appellant.

*Dodge and Johnson*, for the appellee.

412 **BATTLE, J.** The St. Louis, Iron Mountain, and Southern Railway Company is a corporation duly organized according to the laws of Arkansas, and is engaged in operating a railroad in this state. S. P. Leep was employed to work for it at the rate of thirty-five dollars per month of thirty days, and labored under his contract until the 9th of September, 1890, when he was discharged. On the same day he demanded of the company his unpaid wages that were then due, amounting at the contract rate to the sum of twenty-seven dollars and ninety cents. The company failed to pay then, but promised that it would on the 18th of September, 1890. Leep refused to wait until the day of the promised payment, and brought suit before a justice of the peace for the amount due to him, the twenty-seven dollars and ninety cents, and also for a penalty for the nonpayment of the same on the day he was discharged, at the contract rate from the time of such discharge to the day of bringing the suit. He recovered a judgment for thirty-six dollars and sixty-one cents and costs. The defendant then appealed to the Pulaski circuit court. He recovered judgment in that court against the defendant for twenty-seven dollars and ninety cents and costs,

but no penalty or damages; and, failing to recover the penalty, he appealed to this court.

He bases his claim to a penalty or damages upon the act of the general assembly, which is in the following words:

**413** "SECTION 1. Whenever any railroad company, or any company, corporation, or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid; provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"SEC. 2. That no such servant or employee who secretes or absents himself to avoid payment to him, or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"SEC. 3. That any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty": Acts 1889, c. 61.

This act applies to corporations, companies, and persons engaged in the business of operating or constructing railroads or railroad bridges, and to contractors and subcontractors engaged in the construction of any such road or bridge, and requires them to pay their **414** employees, on the day of discharge or of the refusal to further employ them, the unpaid wages then earned by them at the contract rate, without abatement or deduction. The object of the act is to make it unlawful for such companies, corporations, persons, contractors, or subcontractors to contract to pay the wages of those employed by them in the operating of railroads or in the construction of such roads or bridges at any time subsequent to

the day on which the employees may be discharged, or on which such employer may refuse to longer employ them. In other words, it declares the wages shall be paid on such day, notwithstanding they may not be due according to the contract until a day subsequent. In this respect the act attempts to limit the right to contract. Is it constitutional?

The constitutionality of a legislative act is to be determined solely by reference to those limitations which the constitution imposes. No court ought to "declare a statute unconstitutional and void," says Judge Cooley, "solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown such injustice is prohibited, or such rights are guaranteed or protected by the constitution." The judiciary and the legislature are co-ordinate departments of the government, neither of which has a right to invade the province of the other. In determining the validity of a statute the sole question for the courts to decide is one of power, not of expediency, justice, or wisdom. In deciding such questions they should, in the spirit of the comity and goodwill that should prevail between the different departments of the government, resolve all doubts in favor of the constitutionality of the acts of the legislature; and if any act be reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, should <sup>415</sup> give to it the latter, on the presumption that the legislature did not intend to exceed its power: Cooley on Constitutional Limitations, 6th ed., 157, 200, 203, 208; *Sinking Fund cases*, 99 U. S. 700, 718; *Munn v. Illinois*, 94 U. S. 113; *Powell v. Commonwealth*, 114 Pa. St. 292; 60 Am. Rep. 350; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 520.

According to the foregoing test, is the act under consideration constitutional? Section 3 of article 2 of the constitution of this state declares: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Section 8 of the same article ordains that no person shall "be deprived of life, liberty, or property, without due process of law." Section 1 of the fourteenth amendment to the constitution of the

United States provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The right to acquire and possess property necessarily includes the right to contract; for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire property by his own exertion. Of all the "rights of persons" it is the most essential to human happiness.

But the right to contract is not unlimited. The conflicting interests of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public and the government <sup>416</sup> are imposed on every individual. Every man, when he enters into society, undertakes to perform these duties; and necessarily surrenders some rights or privileges on account of his relation to others. His right to contract becomes subject to these duties; among which is the duty to so conduct himself and use his own property as to not unnecessarily injure another. He submits himself to such restraints and burdens as may conduce to the general comfort, health, and prosperity of the state. To conserve and enforce these rights and duties the government can impose such restrictions upon his actions as may be appropriate for that purpose. "This power inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling, regulating authority."

The legislature can control, to some extent, the right to contract in reference to property "clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large." "By devoting his property to a use in which the public has an interest, the owner, in effect, grants to the public an interest in that use, and subjects himself to the control of the legislature for the common good, to the extent of the interest he has thus created." Upon this principle the legislature can fix the maximum of charges for the storage of grain in public warehouses, and for carriage of freight and passengers by common carriers. From the same source comes the power to regulate millers, bakers, hackmen, ferries, wharfingers, innkeepers, and the like; "and

in so doing to fix the maximum of charge to be made for services rendered, accommodations furnished, and articles sold": *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Dow v. Beidelman*, 125 U. S. 680; 49 Ark. 325; *Mobile v. Yvills*, <sup>417</sup> 3 Ala., N. S., 140; 36 Am. Dec. 441. Upon the same principle, it was held in *Spring Valley Water Works v. Schottler*, 110 U. S. 347, "that it is within the power of the government to regulate the price at which water shall be sold by one who enjoys a virtual monopoly of the sale."

It has been held by the courts that the legislature can regulate or prohibit the sale or manufacture of oleomargarine, for the purpose of protecting the public against fraud: *Powell v. Commonwealth*, 114 Pa. St. 265; 60 Am. Rep. 350; *Powell v. Pennsylvania*, 127 U. S. 678; *State v. Addington*, 12 Mo. App. 214; 77 Mo. 110. Common carriers and telegraph companies cannot lawfully stipulate for exemption from responsibility for the negligence of themselves or their servants: *St. Louis etc. Ry. Co. v. Lesser*, 46 Ark. 236; *Liverpool etc. Steam Co. v. Phœnix Ins. Co.*, 129 U. S. 397; *Western Union Tel. Co. v. Short*, 53 Ark. 434. No one can bind himself by an agreement not to engage in any particular business at any time or place: *Taylor v. Saurman*, 110 Pa. St. 3. Such contracts are void, because they are injurious to the public, contrary to public policy.

An act which made it unlawful for any person to transport or move, after sunset and before sunrise of the succeeding day, within certain counties, any cotton in the seed, but permitted the owner or producer to remove it from the field to his gin-house, or other place of storage, was held by the supreme court of Alabama to be constitutional. The court held that "its object was to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory: *Davis v. State*, 68 Ala. 58; 44 Am. Rep. 128; *Mangan v. State*, 76 Ala. 60. Similar statutes have been held to be constitutional by other <sup>418</sup> courts: *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696; *Butchers' etc. Co. v. Crescent etc. Co.*, 111 U. S. 746; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Herdic v. Roessler*, 109 N. Y. 127; *Brechbill v. Randall*, 102 Ind. 528; 52 Am. Rep. 695.

There can be no violation of the constitution in the denial

of the right to contract to those who are incapable of binding themselves thereby. The term "contract" implies "the existence of a physical and moral power of assenting, as well as a deliberate and free exercise of such power. The absence of any of these capacities in either of the parties to a contract renders the person laboring under it incapable of binding himself thereby." Hence restrictions were thrown around the exercise of this right by seamen. They sustained to the master of a ship a servile relation. At common law they owed to him obedience and respect; and in case of disobedience or disorderly conduct the master could punish them, because discipline is necessary, and "without it the ship would always be in great peril, and no voyage could be successfully conducted." The authority of the master over them was like unto that of a parent over his child, or of a master over his apprentice. This employment, and the usages and customs regulating it, constituted them a servile class, as helpless and dependent in many respects as that of an infant, and demanded the protection accorded to them.

The legislature has the power to prohibit the making of contracts when it becomes necessary to protect the rights of others. As, for example, it can provide by statute, as it did in Pennsylvania, that when the debtor and creditor, and a person or corporation owing money to the debtor, are residents of the state, it shall be unlawful for any citizen to send out of the state, by assignment or otherwise, for or without value, any claim against such debtor, with the intent to deprive him of his exemptions from execution by having collections out<sup>419</sup> of such money made in the courts of another state; and that the assignor, in such a case, shall be liable in an action of debt to the person from whom any such claim shall have been collected, by attachment or otherwise, outside of the courts of the state of his residence, for the full amount collected: *Sweeny v. Hunter*, 145 Pa. St. 363.

Another illustration of the power of the legislature to restrict the right to contract, when it becomes necessary to protect others, is furnished by the statutes of this state. It is the duty of every husband to take care of, support, and protect his wife and children, and provide them with a home. To aid him in the discharge of this duty, the constitution of this state declares "that the homestead of any resident of this state, who is married or the head of a family, shall not," except in certain specified cases, "be subject to the lien of

any judgment or decree of any court, or to sale under execution or other process thereon." The obvious intent of this provision was to secure to every resident, who is married or the head of a family, a home, which he may improve and make comfortable, where his wife and children "may be sheltered, and live beyond the reach of misfortunes which even the most prudent and sagacious cannot always avoid." For the purpose of protecting the wife in the enjoyment of this right the statutes of this state provide "that no conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity, . . . unless his wife joins in the execution of such instrument and acknowledges the same."

Other instances of statutory regulations of the right to contract may be found in the statutes of many states prohibiting the taking of usury. They rest upon a traditional policy antedating constitutions. They "proceed," says Mr. Justice Scholfield, in *Frerer v. People*, <sup>420</sup> 141 Ill. 171, "upon the theory that the lender and borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender." Lord Chief Justice Best, in 1825, in delivering the unanimous opinion of the twelve judges in the house of lords upon a question submitted to them under the English usury laws, said: "The supposed policy of the usury laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase national wealth, and to enable the state to borrow on better terms than could be made if speculators could meet the minister in the money market on equal terms": *House of Lords*, 8 Bing. 193. So at last they can be based on the right of the legislature to protect the public welfare.

The statutes of fraud are sometimes referred to for the purpose of showing the power of the legislature to control the right to contract. The object of these statutes was to prevent fraud and perjuries. For this purpose some of them provide that certain contracts shall be in writing, in order to prevent controversies, litigation, and false swearing as to the terms of the contract. Others declare that certain deeds,



conveyances, and transactions shall be void, because they defraud or tend to defraud innocent persons. They are based on the maxim, *Sic utere tuo ut alienum non lædas*. None of them limit the right to contract, but regulate the exercise of it: Mansfield's Digest, secs. 3371-3384. They clearly come within the power of the legislature to protect the rights of persons, prevent wrongs, and enforce honesty and fair dealing in the transactions of individuals.

<sup>421</sup> We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition, and not on the absolute right to control. We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness, declared to be inalienable by the constitution of this state.

When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract, or controlling the terms thereof. In *State v. Goodwill*, 38 W. Va. 179, 25 Am. St. Rep. 863, the supreme court considered the constitutionality of a statute of West Virginia, which declared "that it shall not be lawful for any person, firm, company, corporation, or association engaged in mining coal, ore, or other minerals, or mining and manufacturing them, or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, . . . . to issue for the payment of labor any order or other paper whatsoever unless the same purports to be redeemable for its face value in lawful money of the United States, bearing interest at a legal rate, made payable to employee or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation, or association giving, making, or issuing the same." The court held that the statute <sup>422</sup> was unconstitutional and void, and said: "The property which every man has in his own labor,



as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment, both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression."

A Missouri statute made it unlawful "for any corporation, person, or firm engaged in manufacturing or mining to issue for the payment of wages, any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation, person, or firm"; and provided that the order, check, memorandum, or other evidence of indebtedness so issued should, upon presentation and <sup>422</sup> demand, within thirty days from date or delivery thereof, be redeemed by the person or corporation issuing the same, in goods, at the current cash market price for like goods, or lawful money, as may be demanded by the holder. In *State v. Loomis*, 115 Mo. 307, the supreme court of Missouri (Barclay, J., dissenting) held this statute unconstitutional. Similar statutes were held unconstitutional in *Godcharles v. Wigeman*, 118 Pa. St. 481; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891; *Ramsey v. People*, 142 Ill. 380, and *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206.

In *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep.

533, the statute under consideration provided that "no employer shall impose a fine upon, or withhold the wages, or any part of the wages, of an employee engaged at weaving for imperfections that may arise during the process of weaving." The court held that the statute was unconstitutional, and in doing so said: "Article 1 of the declaration of rights of the constitution of Massachusetts enumerates, among the natural inalienable rights of men, the right of acquiring, possessing, and protecting property. . . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business into which anybody may freely enter. The right to employ weavers and to make proper contracts with them is therefore protected by our constitution, and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our constitution. If the statute is held to permit a manufacturer to hire weavers, and <sup>434</sup> agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently, and fails to perform his contract, for it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one when it declares that he has a natural, inalienable right of 'acquiring, possessing, and protecting property.' Whichever interpretation be given to this part of the act we are of opinion that it is unconstitutional."

In *San Antonio etc. Ry. Co. v. Wilson* (Tex., June 25, 1892), 19 S. W. Rep. 910, it appears that the legislature of Texas

passed an act providing that, in the event a railroad company shall refuse to pay, under certain circumstances, its indebtedness to an employee, within fifteen days after demand thereof, it shall be liable to pay such employee twenty per cent on the amount due him for damages, in addition to the amount due, and that such damages shall not be less than five nor more than one hundred dollars. The supreme court of Texas held the act unconstitutional; and, among other things, said: "Article 10, section 2, of the state constitution, declares that all the railroads are public highways, and railroad companies common carriers; that the legislature shall pass laws to regulate freight and passenger tariffs; to correct abuses and prevent unjust discrimination and extortion in <sup>425</sup> the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable. . . . There is no question as to the scope of this section of our constitution. Its provisions necessarily refer to and contemplate all injuries to the public arising out of a violation of duties due by the railway company to the public as a common carrier. Within this broad field it rests with the legislature to determine what are those duties to the public, and what constitute abuses and injuries, and also what remedies are necessary to prevent them; and to decide whether the abuses shall be corrected through statutes which declare the act or acts to be a crime punishable as such, or whether the act or acts shall be corrected through a civil action, with punitive damages. . . . But when we consider the relation of railway companies to their own servants, both as to acts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons, and which cannot be contemplated or included within the scope of section 2, article 10. . . . We think the position taken by appellant is correct, and section 2, article 10, contemplates only the public duties of railways, and excludes all right of interference with the employment or payment of their servants."

The Texas act, as it appears from the quotation we have made, was held to be unconstitutional, because the constitution of Texas confined legislation, in respect to railroads, to

the duties they owe to the public as common carriers, and excludes all right of interference by the legislature with the employment or payment of their <sup>426</sup> servants. Article 10, section 2, of the Texas constitution, so far as it is set out in the last case referred to, is substantially incorporated into our constitution, except there is no provision in ours expressly authorizing the establishment of means and agencies with power to enforce it as to railroads; and it does not appear in the opinion in that case that there is any power reserved in Texas to the legislature to amend or repeal charters.

An Indiana statute "forbade the execution of contracts waiving the payment of wages in money." This statute was held to be constitutional in *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, on the ground that it "protected and maintained the medium of payment established by the sovereign power of the nation."

A statute of West Virginia prohibited the payment of employees in paper redeemable otherwise than in lawful money; and another provided that coal should be weighed and measured, before it is screened, in a certain way, and that all coal paid for by weight shall be paid for according to such weight at the price agreed on, and that all coal paid for by measure shall be paid for according to such measure at the contract rate. The court, in *State v. Peel Splint Coal Co.*, 36 W. Va. 802, held that these statutes were constitutional, two judges dissenting. The court said: "We base this decision in this case: 1. Upon the ground that the defendant is a corporation in the enjoyment of unusual and extraordinary privileges, which enables it and similar associations to surround themselves with a vast retinue of laborers, who need to be protected against all fraudulent or suspicious devices in the weighing of coal or in the payment of labor; 2. The defendant is a licensee, pursuing an avocation which the state has taken under its general supervision for the purpose of securing the safety of employees, by ventilation, inspection, and governmental report, and the defendant, therefore, <sup>427</sup> must submit to such regulations as the sovereign thinks conducive to public health, public morals, or public security."

*Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, and *State v. Peel Splint Coal Co.*, 36 W. Va. 802, are against the weight of authority, but they do not hold that the legislature has the absolute power to limit the right to contract.

The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a day subsequent to the sale. Such a contract as to the time of performance is necessarily harmless, of purely and exclusively private concern, and cannot affect any one except the parties. It is an important means used in the acquisition of property, which sells for more on time than for cash. Labor commands higher wages when they are payable in the future than it does when they are paid at the time of performance. A large proportion of the business of the world is transacted on a credit. Nations, states, counties, towns, and persons contract debts payable in the future. Property is sold on time under executions, judgments, and decrees of courts. The right of persons to sell or labor on a credit is everywhere, and by all, recognized as legitimate, and is protected by the constitution in the declaration that the right to acquire and possess property is inalienable.

But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, either expressly or as incidental to their existence; and these <sup>428</sup> may be modified or diminished by amendment or extinguished by the repeal of the charters.

The constitution of 1874 (art. 12, sec. 6), ordains: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." The constitution of 1868 (art. 5, sec. 48), declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Under these constitutions the general assembly has enacted statutes providing for the organization of corporations; and from them

the corporations of this state derive their powers subject to the power of the legislature to change them by amending the laws under which they were organized.

As said by Mr. Justice Miller, in *Greenwood v. Freight Co.*, 105 U. S. 13, 19: "A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power." Continuing, he said, in the same case: "As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. 143, 8 Am. Dec. 39, the supreme court of that state made the declaration 'that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.' In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the federal constitution against impairing the obligation of contracts, which, though received at the time with dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 6 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private, as distinguished from public, corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the state could not impair. It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain, in a large measure, this important power,

without violating the provision of the federal constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that, when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract <sup>430</sup> itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In order to avoid the consequences of the rule laid down in the Dartmouth College case many states have availed themselves of Judge Story's suggestion. In chartering the Union Mining Company the legislature of Maryland reserved the right to amend or repeal its charter at pleasure. Afterwards it passed an act providing "that every corporation engaged in mining or manufacturing, or operating a railroad in Alleghany county, and employing ten hands or more, shall pay its employees the full amount of their wages in legal tender money of the United States," and "that every such employee shall be entitled to receive from any such corporation employing him the whole or so much of the wages earned by him as shall not have been actually paid to him in legal tender money of the United States without setoff or deduction of his demand in respect of any account or claim whatever." The Union Mining Company was sued after the enactment of this act by Shaffer and Munn for wages due to its employees. Mr. Justice Irving, in commenting on this act, in that case said: "It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employees otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in any thing but money. . . . The acceptance by the corporation of a charter, with the reservation of the right to alter and amend, made that provision a part of the contract, which, as between the legislature and it, as a private corporation, it must be understood to be. A corporation has no inherent or natural rights like a <sup>431</sup> citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as are granted. A private corporation is only a *quasi*



individual, the pure creation of the legislative will, with just such powers as are conferred expressly or by necessary implication, and none others. Whatever, therefore, may have been the mischief intended to be reached and prevented by this law, by restrictions imposed on the corporation, it was competent for the legislature by this law, which operates as an amendment of its charter, to accomplish": *Shaffer v. Union Mining Co.*, 55 Md. 74.

A statute of Rhode Island provides: "All acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly, unless express provision be made therein to the contrary." The Brown and Sharpe Manufacturing Company was incorporated by the general assembly of Rhode Island for the purpose of manufacturing machinery, subject to a chapter of which this statute was a part. After the incorporation of it the legislature passed an act requiring corporations to pay weekly the employees engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty. In *State v. Brown etc. Mfg. Co.* (R. I., Oct. 3, 1892.), 25 Atl. Rep. 246, which was an action for the violation of this act, the supreme court of Rhode Island held that the act was constitutional, and that it operated as an amendment to the charter of the corporation sued, as it was a reasonable exercise of the power to amend.

In the *Sinking Fund cases*, 99 U. S. 700, "the question was whether Congress had the constitutional power to enact a law compelling the Union Pacific and Central Pacific railroad companies to set aside a portion <sup>432</sup> of their current earnings as a sinking fund for the purpose of meeting a very large indebtedness secured by mortgage upon the roads, and payable at a future day. The majority of the court held that the legislation was valid as an exercise of the general legislative powers of the government, and also because the right to alter or amend the charters of the companies had been expressly reserved to Congress."

In commenting on the reserved power to amend or repeal the charters of corporations in that case, Chief Justice Waite, in delivering the opinion of the court, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr.



Justice Clifford, in *Miller v. State*, 15 Wall. 498, 'it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets'; and again, in *Holyoke Co. v. Lyman*, 15 Wall. 519, 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, 15 Wall. 459, he said, 'the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state'; and again, as late as *Railroad Co. v. Maine*, 96 U. S. 510, 'by the reservation, . . . the state retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities.' <sup>433</sup> Mr. Justice Swayne, in *Shields v. Ohio*, 95 U. S. 324, says, by way of limitation: 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of an amendment or alteration.' The rules as here laid down are fully sustained by authority."

In speaking of the reserved power to amend or repeal the charters of corporations, Mr. Justice Gray, in delivering the opinion of the court in *Commissioners etc. v. Holyoke Water Power Co.*, 104 Mass. 451, 6 Am. Rep. 247, said: "It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights. Under such a clause, for instance, the legislature may make the stockholders of an incorporated bank liable for the future debts of the corporation: *Sherman v. Smith*, 1 Black, 587; *In re Lee & Co.'s Bank*, 21 N. Y. 9. It may vary the measure, and thus enlarge the proportion of the profits which a mutual life

insurance company is required by the terms of its charter to pay to a charitable institution: *Massachusetts General Hospital v. State Assur. Co.*, 4 Gray, 227. Railroad corporations may be compelled, by general or special laws, to make changes in the level, grade, and surface of the roadbed, new structures at crossings of other railroads or of highways, or station-houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contemplated <sup>424</sup> by the original charter or the general laws in force when that charter was granted: *Roxbury v. Boston etc. R. R. Co.*, 6 Cush. 424; *Fitchburg R. R. Co. v. Grand Junction R. R. etc. Co.*, 4 Allen, 198; *Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254; 4 Am. Rep. 555; *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345, overruling *Miller v. New York etc. R. R. Co.*, 21 Barb. 513."

In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, it appears that the constitution of the state of California "provided that corporations might be formed under general laws, and should not be created by special act, except for municipal purposes; and that all laws, general and special, passed pursuant to that provision, might be, from time to time, altered and repealed. A general law was enacted by the legislature for the formation of corporations for supplying cities, counties, and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners, to be appointed in part by the corporation and in part by the municipal authorities. The constitution and laws of the state were subsequently changed so as to take away from corporations which had been organized and put into operation under the old constitution and laws the power to name members of the boards of commissioners, and so as to place in the municipal authorities the sole power of fixing rates for water." The court held that "these changes violated no provisions of the constitution of the United States." Chief Justice Waite, speaking for the court, said: "The Spring Valley company is an artificial being, created by or under the authority of the legislature of California. The people of the state, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all <sup>425</sup> times to alteration or repeal. . . . In California the constitution put this reservation into every charter, and consequently this company was from the

moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body": See *State v. Brown etc. Sharps Mfg. Co.* (R. I., Oct. 3, 1892), 25 Atl. Rep. 246.

It is obvious that the legislature cannot, under the power to amend, take from corporations the right to contract; for it is essential to their existence. It can regulate it when the interest of the public demand it, but not to such an extent as to render it ineffectual, or substantially impair the object of incorporation. The constitution of this state, in reserving the power to amend or repeal, expressly provides that it may be exercised whenever, in the opinion of the legislature, the charter "may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators": Const., art. 12, sec. 6.

Whenever the charters of railroad companies become obstacles in the way of the legislature so regulating their roads as to make them subserve the public interest to the fullest extent practicable, their charters are, in that respect, injurious to the citizens of the state, and can be amended as to defects in such manner as will be just to the corporators. For they are organized for a public purpose, and their roads are declared by the constitution to be public highways, and they are made common carriers. They are clothed with a public trust, and in many respects are expressly subjected by the constitution to the control of the legislature. There is no enterprise in which the public is so largely interested as it is in the successful and efficient operation of railroads. With the trust with which they are clothed is imposed the duty to serve the public as common carriers in the most efficient manner practicable. For this reason <sup>420</sup> the legislature may impose on them such duties as may be reasonably calculated to secure such results. Being created by statute, the legislature may so change them by amendment as to make them subserve the purpose for which they were created. If the legislature, in its wisdom, seeing that their employees are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employees when the same is fully performed, at the end

of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend.

But we do not mean, by holding as we do, to intimate that the legislature can, by way of amendment, fix or limit the compensation of employees of railroad companies. That might seriously affect one of the principal charter rights of the companies, and thereby substantially impair the object of their incorporation. Such a power would be subversive of the right, and, when exercised to its fullest extent, would leave to the corporation the privilege of selecting its employees without the right of contracting with them. An amendment to that extent would be, manifestly, unjust to the companies, and violative of the constitution, which, while it grants the right to amend when in the opinion of the legislature the charter is injurious to the citizens, limits the right to do so to amendments that are just to the corporators. The act in question is not subject to that imputation. It is prospective in its operation, and leaves <sup>437</sup> to the corporations the right of making contracts with their employees on advantageous terms.

Is the act before us a proper amendment? It provides, among other things, that whenever any corporation "engaged in the business of operating or constructing any railroad or railroad bridge" shall discharge with cause any servant or employee thereof, "the unpaid wages of any such servant or employee, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge"; "and if the same be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid." This provision is susceptible of two constructions, one of which makes the act require the corporation to pay the employee all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby. If this be its intention, it is unconstitutional, because its enforcement might take property from the corporation without due process of law. For the employee is not entitled to the stipulated wages until he has performed the contract. He may have damaged

his employer, by the failure to do so, in a sum larger than the wages he would have been entitled to receive in the event he had complied with his agreement. To compel the corporation, in such a case, to pay any sum whatever, would be a deprivation of property without due process of law. The same would be equally true if the corporation should be compelled to pay full wages when the damage caused by the nonperformance of the contract does not exceed them: *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533. Such an amendment of the charters of corporations is clearly unjust to the corporators.

<sup>428</sup> The other construction is more reasonable. It makes the words "without abatement or deduction" mean "without discount." The legislature evidently thought that the employee might receive money or property in the course of his employment in part payment for his labor, and evidently intended that the wages thus paid should not be repaid. A strict construction of the words "without abatement or deduction" would deprive the corporation of a credit for the money or property in a settlement with its employee for his services. Then, again, the act requires the corporation to pay only the unpaid wages earned, at the contract rate, at the time of his discharge. Stipulated wages cannot be earned except by the performance of the contract by which the employer agrees to pay them. Obviously, then, the act means, by the words "without abatement or deduction," that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment. When construed in this manner, this provision of the act is constitutional, and it is our duty to so construe it.

Tested by the principles of law we have indicated, the act under consideration is unconstitutional so far as it affects natural persons. As to corporations it is a valid statute. It does not seriously impair their right to contract, but leaves them to contract with their employees on profitable terms.

So much of the act as is unconstitutional can be eliminated, and the remainder stand: *State v. Marsh*, 37 Ark. 356; *Little Rock etc. Ry. Co. v. Worthen*, 46 Ark. 312; *State v. Deschamp*, 53 Ark. 490; *Davis v. Gaines*, 48 Ark. 370, 383. After this elimination, so much of the first section of the act as remains in force reads as follows:

<sup>439</sup> "SECTION 1. Whenever any corporation, engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge, with or without cause, or refuse to further employ, any servant or employee thereof, the unpaid wages of such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid. *Provided*, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

It cannot be truthfully said that so much of the act as we find to be in force is unconstitutional, because it interferes with the rights of employees to make such contracts with corporations as they see fit. As said in *State v. Brown etc. Sharpe Mfg. Co.* (R. I., Oct. 3, 1892), 25 Atl. Rep. 253: "No inhibition is placed upon employees to make such contracts as they choose, with any person or body, natural or artificial, that is authorized to contract with them. But corporations are artificial bodies, and possess only such powers as are granted to them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into."

The "act being general and uniform in its operation upon all persons coming within the class to which it applies it does not (if amendments to charters can) come within that special legislation prohibited by the constitution. For it applies to and embraces all persons 'who are or may come into certain situations and circumstances,' and is general and uniform; not because it operates <sup>440</sup> upon every person in the state, for it does not, but because every person who is brought within the relations and circumstances provided for is affected by the law": *Little Rock etc. Ry. Co. v. Hanniford*, 49 Ark. 291; *McAunich v. Mississippi etc. R. R. Co.*, 20 Iowa, 342; *Missouri Ry. Co. v. Mackey*, 127 U. S. 205; *Minneapolis Ry. Co. v. Beckwith*, 129 U. S. 27; *In re Oberg*, 21 Or. 406; *Hawthorn v. People*, 109 Ill. 311; 50 Am. Rep. 610; *Youngblood v. Birmingham Trust & Sav. Co.*, 95 Ala. 521; 36 Am. St. Rep. 245; Cooley's Constitutional Limitations, 6th ed. 480, 481.

This action was brought before a justice of the peace for the recovery of wages earned and the penalty or damages allowed by the act on account of the nonpayment thereof from the time the wages were due to the day of bringing the suit. The question arises, Did the justice of the peace have jurisdiction? We have held that a justice of the peace did not have jurisdiction in an action for the recovery of a statutory penalty: *Baltimore etc. Tel. Co. v. Lovejoy*, 48 Ark. 301. On the other hand, the jurisdiction of justices of the peace in actions for the recovery of punitive or exemplary damages has been sustained. The question then is, Is the amount allowed to the employee, in addition to the wages earned, a penalty or exemplary damages? The answer depends on the interpretation of so much of the act as is in the following words: "And if the same (wages) be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employee shall continue at the same rate until paid." According to the act, the wages earned become due when the employee is discharged or the employer refuses to longer employ him. The additional amount is allowed on account of the failure to pay the wages when due, and is regulated according to the length of the delay of payment. It is allowed for a double purpose, as a compensation for the delay, 441 and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages: *Day v. Woodworth*, 13 How. 363; *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512; *Minneapolis Ry. Co. v. Beckwith*, 129 U. S. 34-36; *Sedgwick on Damages*, 6th ed., 35. The name given to it by the act cannot change it. Our conclusion is, the additional amount is allowed as exemplary damages, and that the justice of the peace had jurisdiction in this action.

The judgment of the circuit court is, therefore, reversed, and judgment will be rendered by this court in favor of appellant against appellee for twenty-seven dollars and ninety cents, and three dollars and fifty cents as exemplary damages, the amount sued for, and all his costs.

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BUNK, chief justice, dissented. He referred to the fact that the court had held that the act in question could not stand upon the ground that it was a legitimate expression of the police or of any of the great powers said to be inherent in government, and had rested its opinion upon the ground that the act in question might be treated as an amendment to the corporation laws, and therefore supported by the provision of section 6 of article 12 of



the constitution of Arkansas, declaring: "Corporations may be formed under general laws, which have from time to time to be altered or repealed. The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created; whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." The opinion of the majority of the court, he said, was that the act might be treated as amendatory of the incorporation laws, but he insisted that the court had no authority to arbitrarily treat one statute as amendatory of another. He quoted section 23 of article 5 of the state constitution, declaring: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be reinstated and published at length." He held that the decisions of the court showed that though "an act, as an independent law, may not be objectionable on constitutional grounds, yet, as an amendment of some existing law, it may be invalid. The rule is a reasonable one, because no law should be altered or amended without something appears in the amendatory act to give notice to the public of a change in the original law; while, if the new act is intended as an independent act, the original act is not affected, and there is nothing to take notice of."

**CONSTITUTIONAL LAW—LIMITATION ON POWER OF LEGISLATURE.**—The legislature may enact what laws to them seem fit, upon all subjects wherein not restrained by the constitution: *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677; *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521, and note; *In re Marlera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106; and in so far as it keeps within the limits of its powers in enacting laws its motives cannot be inquired into, and its discretion is not subject to judicial review: *State v. Cunningham*, 83 Wis. 90; 35 Am. St. Rep. 27; *Stevenson v. Colgan*, 91 Cal. 649; 25 Am. St. Rep. 230, and note.

**CONSTITUTIONAL LAW.—ABRIDGMENT OF RIGHT TO CONTRACT:** See *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206, and note, with the cases collected discussing statutory regulation of the relation between employers and employees. For an extended discussion of the legislative power to regulate contracts, see the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 873.

**CORPORATIONS—LEGISLATIVE POWER TO AMEND OR REVOKE CHARTERS.**—Under a constitutional provision giving the legislature power to alter or revoke any corporate charter whenever, in its opinion, the privileges granted become injurious to the citizens of the commonwealth, the legislature is the judge as to when such privileges become injurious: *Wagner Free Institute v. Philadelphia*, 132 Pa. St. 612; 19 Am. St. Rep. 613, and note. See, also, *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135, and note with the cases collected and the extended note to *People v. O'Brien*, 7 Am. St. Rep. 721.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CALIFORNIA.**

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**BUCKLEY v. SUPERIOR COURT.**

[102 CALIFORNIA, 6.]

**ESTATES OF DECEDENTS.—PROCEEDINGS FOR THE ADMINISTRATION** of the estates of deceased persons and for their distribution are purely statutory.

**PROBATE JURISDICTION—QUESTIONS OF TITLE.**—The superior court while sitting as a court of probate has no other powers than those given it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction conferred upon it. It cannot determine disputes between heirs or devisees and strangers as to the title to the property.

**PROBATE PARTITION CANNOT BE MADE EXCEPT OF ESTATES OF WHICH THE DECEDENT DIED SEISED IN SEVERALTY,** and this remains true, though one of the heirs is the owner of the other moiety of the property. The subject matter of the jurisdiction is the property of the decedent only, and this jurisdiction cannot be extended even by the consent of the parties interested.

**THE JURISDICTION OF THE PROBATE COURT USUALLY TERMINATES** upon the entry of a decree of distribution, naming the persons entitled to the property held by the decedent, and the share of each.

**PROBATE PARTITION, JURISDICTION TO MAKE, WHEN LOST.**—Under a statute declaring that partition of the estate of a decedent may be ordered on the petition of any person interested therein, and such petition may be filed and notice given at any time before the entry of the decree of distribution, a petition filed after the entry of such decree cannot give the court jurisdiction to proceed to make partition.

**PETITION** of certain minors, by their guardian, for a writ of prohibition. In addition to the facts stated in the petition for partition, and referred to in the opinion of the court, it appeared by the answer filed by the respondents and conceded to be true by the petitioners, that while the decedent was the owner of an undivided interest only in a large por-

tion of the property sought to be partitioned, yet the other undivided interest therein was owned by Vincent P. Buckley, who was one of her heirs at law, and that, after the filing of the petition in probate seeking a partition of the property, the petitioners in this proceeding had appeared in the probate court by their guardian, and had not made any objection in that court until some time after the appointment therein of referees for the purpose of making such partition.

*A. Comte, Jr., and Freeman and Bates*, for the petitioner.

*Blake, Williams, and Harrison*, for the respondent.

¶ The COURT. This is an application for a writ of prohibition commanding respondent to refrain from further proceedings in the estate of Catherine M. A. Buckley, deceased, respecting the partition of certain real estate.

The petition shows that at the time of her death, C. M. A. Buckley was the owner of undivided interests in certain real property situated in the counties of Napa, Marin, and San Francisco; that on May 12, 1893, the final account of the executor was allowed and approved; that on the same day the decree of final distribution of the estate was entered, distributing one-half of the interest of the decedent to Vincent P. Buckley, and the remaining one half-interest to E. J., Paul K., and Margaret G. Buckley. No petition for the partition of the estate of the decedent had been filed by any person at the time when the order of distribution was made, nor at any time prior to June 17, 1893; on the day last named Vincent P. Buckley presented a petition praying that commissioners be appointed to make a partition of all the estate of decedent, including said undivided interests; thereafter, August 30, 1893, the court made an order directing that partition of the estate be made among said persons entitled thereto in proportion to their respective rights, and that William E. White, Martin J. Burke, and Frank W. Lawlor be appointed commissioners to make the partition.

It is claimed by petitioner that the court below did not have jurisdiction in the proceedings sought to be prohibited:

1. Because the proceeding is for the partition in probate of property of which the decedent was a tenant in common; and
2. Because jurisdiction cannot exist in any case to make partition in probate proceedings, unless the petition therefor is filed before the entry of the final decree of distribution.

• We see no escape from the conclusions contended for by

the petitioner. Proceedings for the administration of the estates of deceased persons, and for their distribution, are purely statutory. The court, while sitting as a court of probate, has no other powers than those given to it by the statute, and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction which is conferred upon it. It has no power to determine disputes between heirs or devisees and strangers as to the title to property: *Smith v. Westerfield*, 88 Cal. 378; *In re Haas*, 97 Cal. 232.

Section 1675 of the Code of Civil Procedure, conferring upon the probate department of the superior court power to partition estates held in common, and, undivided, applies only to cases before the court in which it is possible to set aside property to be held in severalty. Partition necessarily results in the termination of the cotenancy, and vests in each person a sole estate in a specific purparty or allotment of the lands; but here any one of the parcels which may be set aside to the minor heirs could not be finally held in severalty under the decree, because of the title of the other cotenants not before the court. Another partition would follow, which might result in setting aside to the cotenants, not now before the court, the same land which the probate court had set aside to the minors. That partition cannot be made in probate unless the interest of the decedent is an estate in severalty we think is clear: *Richardson v. Loupe*, 80 Cal. 496. The subject matter of the jurisdiction is the property of the deceased only, and this jurisdiction cannot be extended even by the consent of all parties interested in the property. The probate court is authorized to make partition only in certain cases of joint tenure. Its action must be confined to a single estate. Under statutes like ours partition is had only because the land was the property of the decedent, not because it is the land of heirs. The fact that jurisdiction of all undivided interests of a decedent<sup>9</sup> is given does not evince a purpose to intrust the court with the power to make partition or allotment of property in which strangers have an interest: *Snyder's Appeal*, 36 Pa. St. 168; 78 Am. Dec. 372. See, also, *Matter of Will of Walker*, 136 N. Y. 28; *Romig's Appeal*, 8 Watts, 415.

The cotenants not before the court could not be affected by the partition. Section 1686 of the Code of Civil Procedure makes the decree binding only "on all parties interested in the estate." The court may recognize the interests of grantees

of the heirs or devisees and the simple fact that the code sec. 1666 makes special provision for such grantees indicates that it was not intended to extend the rule any further. Sections 1666 and 1668 require that notice be given to all parties interested residing in the state, before the commissioners are appointed, or partition is ordered, stating the time and place and where the commissioners will proceed to make the partition: but the probate court can inquire only as to who are parties in interest claiming under the decedent, and whether the proper notice has been given to them. As it has no jurisdiction of any one except those interested in the estate it is clear that it cannot determine whether proper notice has been given to the latter, or bring them within its jurisdiction.

The authorities cited by counsel for respondent, we think, do not sustain his contention. *Brewster v. Hill*, which is reported in a note to *Gates v. Irick*, 2 Rich. 599, was decided upon the provisions of the acts of 1824 and 1839, referred to in the opinion, and the court said that these acts were intended to save the delay and expense to these proceedings in equity, by giving to the judges of the courts of ordinary jurisdiction to make partition of the real estates of deceased persons, by sale or division in certain cases. . . . When a judge of the court of equity was required incidentally to decide upon questions of title he, according to his discretion, determined for himself, or sent an issue to be tried at law. The act 10 of 1824 transferred cases of a limited amount, within this branch of equity jurisdiction, to the courts of ordinary, thus making them, as to such matters, inferior courts of equity; and, by the right of appeal to the court of common pleas, a trial by jury was saved to any party who desired it." No such intention on the part of the legislature is manifested in our statutes. In *Earl v. Rowe*, 35 Me. 421, 53 Am. Dec. 714, it appears that the statute authorized partition after settlement. The parties were all heirs or devisees.

2. Section 1666 of the Code of Civil Procedure provides that in the decree of distribution the court must name the persons and the proportions or parts to which each shall be entitled, and that such decree is conclusive, subject only to be reversed, set aside, or modified on appeal. Ordinarily, after the entry of this decree, the court has no power over the property or the rights of the distributees (*Wheeler v. Bolton*, 54 Cal. 302); and courts of equity alone can afford relief: *Estate of Hudson*, 63 Cal 454. Sections 1675 and 1676 of the

**Code of Civil Procedure, however, provide for an exception, viz., that when the estate assigned by the decree to two or more heirs, devisees, or legatees is common, and the respective shares are not separated, partition may be made by three disinterested persons. The partition can be ordered on the petition of any person interested in the estate, but said petition must be filed, and the attorneys, guardians, and agents representing absent parties must be appointed and notice given before the order or decree of distribution is made. It is claimed by counsel for respondent that the section as to time is merely permissive. It says the petition may be filed and notice given at any time before the decree, but we think the intention was that it must be filed before the decree of distribution. There is every reason for so holding. As stated before, ordinarily the court loses jurisdiction over the property after the entry of the decree of distribution, except to compel delivery. The section gives to the court the power to reserve its jurisdiction <sup>11</sup> to proceed beyond the making of the decree. For this purpose the parties in interest must be kept before the court, and must be given an opportunity to protect themselves in the proceedings looking to a division of their property. If a petition may be filed at any time after the decree of distribution is entered, how are the parties to have notice of the intended proceedings? Must they watch the record for years at their peril? The notice required by section 1676 is confined to "all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any, in this state, of such as reside out of this state." Every one interested in the settlement of an estate is supposed to be before the court, and to take notice of its proceedings, but when the estate has been settled and the interests of all parties have been ascertained by the decree of distribution, and the property has been set over to them absolutely and unconditionally, without any previous proceedings indicating an intention to divide the property, the jurisdiction of the court is exhausted.**

**We think that the court below ought not to proceed any further towards the partitioning of the undivided interests, described in the affidavit filed herein. The rights of the parties should be settled by a suit for partition, in which all persons having any interest in the lands may be made parties, and in which the commissioners will not be required to divide**

the property in each county separately, as they would have to do under section 1677.

It is ordered that the writ issue as prayed for.

BEATTY, C. J., being disqualified did not participate in the foregoing decision.

Rehearing denied.

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**ESTATES OF DECEDENTS—JURISDICTION TO ADMINISTER.**—The probate court can take jurisdiction and administer remedies only as provided by statute: *Grimes v. Norris*, 6 Cal. 621; 65 Am. Dec. 545. The superior court acting in probate proceedings obtains its authority to award costs from the statute. Its power is confined to the terms of section 1720 of the Code of Civil Procedure: *Henry v. Superior Court*, 93 Cal. 569. But in the earlier cases of *Clarke v. Perry*, 5 Cal. 58, 63 Am. Dec. 82, and *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703, it was held that most of the powers of the probate court belong peculiarly and originally to a court of chancery which still retains all of its jurisdiction.

**PARTITION BY PROBATE COURT.**—A probate court may partition real estate among heirs and devisees under the Maine statute, and may set off to a devisee of net profits his portion of the land devised: *Burl v. Rowe*, 85 Me. 414; 58 Am. Dec. 714. The partition of a decedent's estate is merely incidental to general probate jurisdiction, and is void if the grant of administration is void: *Sigourney v. Sibley*, 21 Pick. 101; 32 Am. Dec. 248. The orphans' court has jurisdiction to decree partition only in certain cases of joint tenure, and these cases are defined by statute: *Snyder's Appeal*, 36 Pa. St. 166; 78 Am. Dec. 372.

#### Partition in Connection with the Distribution of the Estates of Decedents.

**STATUTORY JURISDICTION AND THE POWER TO CONFER IT.**—Upon the death of the owner of real property his estate usually vests in two or more persons in cotenancy, and, if distributed to them in undivided interests, they must resort to an independent suit or proceeding for the purpose of converting their several interests into estates in severalty, unless the statutes of the state in which their property lies provide for some proceeding in connection with the settlement and distribution of the estate, by which the same purpose may be accomplished as that sought by a suit for partition. In perhaps a majority of the states, statutes have been enacted authorizing the court having jurisdiction over the estates of decedents to make partition thereof among the heirs, devisees, or other beneficiaries. The jurisdiction thus established is scarcely second to any in importance, and it is a just ground of regret that the statutes regulating its exercise are so general in their terms, and the decisions interpreting them so infrequent, that the practitioner must proceed almost without a guide, unless at liberty to pursue the general rules applicable to proceedings for partition conducted in other courts.

The power of the legislature to confer upon probate, surrogate, and other like courts, authority to make partition has been disputed, especially in those states whose constitutions vest in courts other than those named general jurisdiction in all cases in equity. It must, however, we think, be conceded, both upon principle and upon authority, that the setting aside to

the heirs or devisees of a decedent their due proportion of his estate, to be held by them in severalty, may be regarded as a proper step in the distribution of such estate, and may, therefore, be committed to any court having jurisdiction over the estates of decedents, without in any respect infringing upon the jurisdiction of courts of equity, or of such other courts as may be authorized to make partition of the property of cotenants upon the suit of any one of their number: *Robinson v. Fair*, 128 U. S. 53; *De Castro v. Barry*, 18 Cal. 96; *Rosenberg v. Frank*, 58 Cal. 387, 402.

*With Respect to the Time When Application may be Made* for the partition of the estate of a decedent it is obvious that it cannot precede the valid appointment of an administrator or executor, for the reason that it is merely ancillary to the administration. Therefore, if the supposed grant of administration is declared void, the proceedings for partition cannot be rescued from the same fate: *Sigourney v. Sibley*, 21 Pick. 101; 32 Am. Dec. 248. Not until the estate has been settled, and it has been ascertained that the property will not be required to be sold to pay the debts of the decedent or other claims against his estate, can there be any assurance that there is any thing to partition, or if any thing, what, and we presume that any application before that time is premature. So, also, in those states in which the court has, and must exercise, jurisdiction to determine who are the respective heirs or legatees, and what are their several interests, no partition can precede such determination.

The entry of a decree making final distribution of the estate of a decedent generally exhausts the jurisdiction of the court over that subject, so that, unless such decree of distribution is set aside upon appeal, motion to vacate, or other appropriate proceeding, no other or different decree of distribution can be made: *Wheeler v. Bolton*, 54 Cal. 302; *Estate of Hudson*, 63 Cal. 454; *Buckley v. Superior Court*, 102 Cal. 6, ante, p. 135; *Hurley v. Hamilton*, 37 Minn. 160. As partition in connection with the settlement and administration of the estate of a decedent is but a perfected distribution thereof, it would seem that if such distribution is apparently completed without any proceeding being taken for partition that the respective parties may be regarded as dismissed from the further jurisdiction of the court, and, therefore, precluded from reviving such jurisdiction by subsequent proceedings for partition. This was substantially the view taken in the principal case. The statute of California, under which the proceeding there in question was authorized to be conducted declared "that the petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate." The petition was not filed until after the order or decree of distribution had been made, and it was therefore held that the court had lost jurisdiction to make the partition, and that it must be prohibited from further proceeding. It is true that this decision may be regarded as simply construing a local statute. Independently of specific provisions upon this subject there must generally be some time after which no application for partition can be made. This time, we think, cannot be later than the closing of the estate, and the formal discharge of the executor or administrator: *Oox v. Ingleton*, 30 Vt. 258; *Collamer v. Hutchins*, 27 Vt. 733; or the entry of a decree of final distribution: *Hurley v. Hamilton*, 37 Minn. 160. But in Maine and Pennsylvania the application may be made for an unlimited time after the distribution and closing of the estate, provided the title of the petitioning heir or devisee has not been extinguished



by prescription: *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634; *Muri v. Rowe*, 35 Me. 414; 58 Am. Dec. 714.

*The Petition may be Filed by any Person Entitled to a Partition.*—If a minor, he may appear by his guardian; if a married woman, her husband may petition in her right: *Eckert v. You's Admr.*, 2 Rawle, 138. If a conveyance has been made by any of the heirs, his grantee is usually entitled to make application for partition: *Stewart's Appeal*, 56 Pa. St. 241; *De Castro v. Barry*, 18 Cal. 99; *Manly's Estate*, 1 Ashm. 363. In Pennsylvania the application may be made by a widow of an heir who has an estate in remainder after the life of his mother who died before the petition was filed: *Cote's Appeal*, 79 Pa. St. 235; and may probably also be by a tenant for life: *Rankin's Appeal*, 95 Pa. St. 358. In Alabama the personal representative of a deceased tenant in common may maintain the proceeding in the probate court for the partition of the property of the decedent: *McCorkle v. Rhea*, 75 Ala. 214. As an interest in the property and a right to have a partition are indispensable elements of the applicant's claim, the fact that the court has found that he is not an heir of the decedent, nor otherwise entitled to an interest in the estate, is conclusive against his claim for this relief: *In re Kate's Estate*, 148 Pa. St. 471.

*A Petition or Application in Writing is Essential*, and a partition will be adjudged void unless such written petition is established, except when the proceedings are questioned after so great a lapse of time that the court may reasonably presume that such petition has existed in due form, but has been lost: *Brown v. Sceggell*, 22 N. H. 548. In the majority of the states the statutes are either wholly silent or else speak in general or vague terms respecting the contents of the petition for partition. When any such petition is required it seems to be obvious that it ought to at least set forth the facts upon which the court is called to act sufficiently to inform the court of the names of the interested parties so far as known: *Ragan's Estate*, 7 Watts, 438; *Richards v. Rote*, 68 Pa. St. 248; the respective moieties and interests of each, and the property sought to be divided among them. These proceedings are viewed with strictness by the courts, and there is a general tendency to exact at least a substantial compliance with every requirement of the statute upon the subject, and in the absence of such compliance, to avoid them, even when collaterally assailed. Thus, in Alabama, among the other requirements of the petition is that it state the names and residences of the persons interested in the estate. The failure to disclose the names of the heirs is fatal to the proceeding: *Whitman v. Reese*, 59 Ala. 532; *Johnson v. Ray*, 67 Ala. 603. This rule was applied where the petition had been filed by the personal representative of a deceased tenant in common, as authorized by the statute, but it failed to disclose who were the heirs or other successors in interest of such decedent: *McCorkle v. Rhea*, 75 Ala. 213. The omission to state the place of residence of interested parties, though their names were disclosed, has also been held fatal to the proceeding: *Baliard v. Johns*, 80 Ala. 32.

*The Parties to the Proceeding Must Include* all persons having any interest in the property derived from and under the decedent, and if any of such persons are not made parties, whether infants or adults, their interests cannot be affected by the partition: *Whitman v. Reese*, 59 Ala. 532. By property derived from and under a decedent we mean such only as was acquired from him by descent, devise, or bequest, for if he, in his lifetime, conveyed the property, or any part thereof, the part so conveyed constitutes no part of his estate in probate, and cannot be there partitioned: *Dresher v. Allen*.



*town Water Co.*, 52 Pa. St. 225; 91 Am. Dec. 150. If any of the heirs or devisees has conveyed his share the conveyance must be recognized and protected, and the part conveyed set off to his grantee: Vt. Stats., ed. 1880, sec. 2257; *Estate of De Castro v. Barry*, 18 Cal. 96; Wis. Rev. Stats., sec. 3945; Howell's Mich. Stats., sec. 5970. A conveyance made during the pendency of the proceedings does not impair the effect of the partition: *Cook v. Davenport*, 17 Mass. 345. A known vendee must be made a party, or the proceedings cannot affect his interest: *Butler v. Roy*, 25 Mich. 53; 12 Am. Rep. 218; *Thompson v. Stitt*, 56 Pa. St. 156. It is not necessary, to entitle a person to be made a party to the proceeding for partition in probate, that his estate be one in fee. Hence, if he or she has a life estate by reason of being the surviving husband or wife of a deceased cotenant, his or her interest as such cannot be affected, unless he or she is made a party to the proceeding: *Ballard v. Johns*, 80 Ala. 32; *Barclay v. Kerr*, 110 Pa. St. 130.

*To What Subject Matter Extends.—The Questions Which may be Litigated and Determined* are restricted by the limited jurisdiction of the court, and, in some of the states, by the manifest fear that the jurisdiction cannot be safely exercised in any but the most simple cases. In the first place, the jurisdiction of a court of probate is necessarily confined to the estate of a decedent, and while it may be authorized to determine who has succeeded to such estate as heirs, devisees, or otherwise, it has no authority to consider or determine adverse claims to the property made by persons whose title was not acquired from or under the decedent: *Stewart v. Lohr*, 1 Wash. 341; 22 Am. St. Rep. 150; *Will of Walker*, 136 N. Y. 28. This rule remains applicable, though the court having jurisdiction over the estate of the decedent is also possessed of general common law and equity jurisdiction, for, while acting in a probate proceeding, it is not exercising, and cannot exercise, its general jurisdiction either as a court of chancery or of common law: *Theller v. Such*, 57 Cal. 459; *In re Algier*, 65 Cal. 228; *Smith v. Westerfield*, 88 Cal. 378; *In re Haas*, 97 Cal. 232. In some of the states, if the decedent was a cotenant with others, the court is given authority to set off his share from that of the living cotenants: Vt. Stats., ed. 1880, sec. 2259; Mass. Stats. 1882, sec. 60, p. 1035; *Parson's Estate*, 64 Vt. 193; and in others the court may proceed to make complete partition between a deceased and surviving cotenants: Tex. Stats. 1879, sec. 2132; Brightley's Purdon's Digest, sec. 152, p. 538; *Stewart v. Allegheny Nat. Bank*, 101 Pa. St. 342. Sometimes the court is authorized to act only when the shares or interests of the parties are not in dispute, and do not seem uncertain: Me. Stats., ed. 1883, secs. 8, 9, p. 550; *Kelley v. Kelley*, 41 N. H. 501; *Gage v. Gage*, 29 N. H. 533; Mass. Stats., ed. 1882, sec. 59, p. 1035. In such cases the jurisdiction of the court is not ousted or suspended by the mere claim of one of the parties that there is a dispute or uncertainty. "To deprive the probate court of its jurisdiction in a matter of this kind in any particular case it must be made to appear that there is a real doubt and uncertainty in relation to the legal rights of the parties. The mere fact that they do not agree what those rights are, or that they are in controversy in respect to them with each other, is not of itself sufficient and conclusive. It must first be by some means affirmatively and satisfactorily shown that there is an actual dispute and uncertainty concerning their shares or proportions, which can be definitely determined only by submitting some controverted question of fact to a jury, or some doubtful and contested question of law to a legal tribunal competent to decide it. If the facts in reference to which

the alleged dispute or uncertainty arises are all known to, and expressly admitted by, the parties, and the law applicable thereto is clearly settled and established, and if these show that the court has jurisdiction, it is the duty of the judge to proceed and cause the partition to be made, although one of the parties should insist that there is a dispute and controversy concerning their relative shares and proportions of the estate": *Dearborn v. Preston*, 7 Allen, 192; *Ballard v. Johns*, 80 Ala. 32; *Marsh v. French*, 159 Mass. 469; *Blackwell v. Blackwell*, 86 Tex. 207. If, after the court has assumed jurisdiction and appointed commissioners, there arises a dispute or uncertainty, the court will proceed with the partition: *Potter v. Hazard*, 11 Allen, 187. The fact that the decedent did not die seized of the lands sought to be partitioned sometimes ousts the court of its jurisdiction: *Law v. Patterson*, 1 Watts & S. 184; *Galbraith v. Green*, 13 Serg. & R. 93; *McMasters v. Carothers*, 1 Pa. St. 324. In Pennsylvania a partition can be made only when the course of descent has not been altered by the provisions of the last will and testament of the decedent. Hence, if he devises all his property to a portion of his heirs, thereby excluding others from their inheritance, no partition in probate can be made, though such of the heirs as are not excluded from the will hold the estate in cotenancy in equal moieties: *Vowinckel v. Patterson*, 114 Pa. St. 21. As the proceeding is merely ancillary to the settlement of the estate of a decedent, it cannot involve any title not held by him at the time of his death: *Dresher v. Allentown Water Co.*, 52 Pa. St. 225; 91 Am. Dec. 150; nor determine the title of one of the heirs who claims to be the sole owner of the property: *Hell's Estate*, 6 Pa. St. 457. Generally, questions of title, so far as they can arise in probate proceedings, are disposed of before the commissioners are appointed to make the partition by a decree of distribution conclusively fixing the share of each heir or devisee in the estate of his ancestor or testator: *In re Garraud*, 36 Cal. 277; *Freeman v. Rahm*, 58 Cal. 111; and the office of the proceedings for partition is merely to segregate the shares so fixed from each other, and to transform them from undivided interests to estates in severalty. The title which is within the jurisdiction of the court is the legal title only, and partition may be made in accordance with such title without affecting or prejudicing equitable rights or titles dependent thereon, except where sales are made in pursuance of such partition to *bona fide* purchasers having no notice of any equitable right or interest attaching to the legal estate: *Coperton v. Hall*, 83 Ala. 171. From the proposition hereinbefore asserted, that the jurisdiction of the court is confined to the estate of the decedent, it results, in the absence of express statutory provision to the contrary, that partition cannot be made except when he held an estate in severalty. Therefore, if he was merely a cotenant with others, there cannot be any partition in probate between him and them, and such attempted partition, even though made with the acquiescence or consent of all the parties in interest, must necessarily be void, because the court is without jurisdiction over the subject matter: *Snyder's Appeal*, 36 Pa. St. 166; 78 Am. Dec. 372; *Romig's Appeal*, 8 Watts, 415; *Dresher v. Allentown Water Co.*, 52 Pa. St. 225; 91 Am. Dec. 150; *Feather v. Strohoecker*, 3 Pen. & W. 505; 24 Am. Dec. 342; *Hell's Estate*, 6 Pa. St. 459; *Richardson v. Loupe*, 80 Cal. 490; nor can any exception to this rule be maintained by showing that one of the heirs of the decedent was a cotenant with him in his lifetime, and, therefore, he and the other heirs of the decedent own the entire property sought to be partitioned. As to interests which he did not acquire as heir or devisee of the decedent, he is not a party before the court, and the court has no jurisdiction to make

any inquiry or determination respecting, or any disposition of, such interests: *Buckley v. Superior Court*, 102 Cal. 6; ante, p. 135.

The case of *Brennan v. Hill*, decided in 1838 by the court of appeals of South Carolina, the opinion in which is printed by way of note to *Gates v. Irick*, 2 Rich. 599, has been cited as in opposition to the views here expressed. The language of the statute in question was, however, essentially different from that usually employed in statutes authorizing proceedings in partition in connection with the settlement and distribution of the estates of decedents. The orphans' court of South Carolina was apparently vested with authority to act independently of there being any proceeding before it respecting the administration of an estate. A statute, enacted in 1824, purported to give the court "full power and authority upon the application of any person or persons interested therein, to make sale or division of the real estate of any person or persons who may have died or shall hereafter die intestate or leaving a will." The purpose of this act was apparently to have a sale of lands made in all cases where they belonged to a decedent and could not be divided, and therefore the appellate court in the case cited sustained a sale of the interest of a decedent consisting of a moiety only of the property. In other words, the orphans' court was given general authority to sell any property in which a decedent had an interest, upon the application of any person interested therein, and this jurisdiction was not a part of its special jurisdiction to administer upon and settle the estates of decedents.

If the statute under which the proceedings are conducted authorizes the commissioners to segregate the interest of a deceased tenant in common, and to then make partition thereof, and they, at the suggestion or with the consent of the other cotenants, undertake to partition the whole property, and the court, upon the report of their proceedings, undertakes to confirm them, such confirmation is absolutely void, because it cannot, even by their consent, exercise jurisdiction over the estates or interests of the cotenants of the decedent: *Parsons' Estate*, 64 Vt. 193. In some of the states the authority of the court is limited to lands within the county in which it is held, and where such is the law any attempted partition of lands outside of that county is absolutely void: *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

The granting to courts of probate of authority to partition the lands of decedents is not of itself a withdrawal of such authority from courts of chancery proceeding in suits brought by a tenant in common of such property. The jurisdiction of the two courts is concurrent. If, however, the court of probate first begins to exercise jurisdiction upon the subject, its authority becomes exclusive, and courts of chancery will not take action unless some special cause for the exercise of chancery jurisdiction has arisen, as where it appears, that, unless equity interferes, complete justice cannot be done: *Wilkinson v. Stuart*, 74 Ala. 198.

*Jurisdiction Over the Persons Whose Interests are Sought to be Affected* by the proceeding is here, as elsewhere, indispensable to the validity of the partition. This jurisdiction is not established by the original proceeding, wherein the grant was made of letters testamentary or of administration, nor yet by the proceeding for the distribution of the estate in undivided moieties. It must be brought into being by some kind of notice to the parties interested, designed to advise them of the fact that the interests which exist in common and undivided are about to be segregated into estates in severalty. The contents of the notice and the modes of its service may be as prescribed by statute, or the court may be vested with a discretion to designate the form of the notice and the mode of its service. But notice as prescribed by statute

or the order of the court is essential, and if any person has been proceeded against in the absence of such notice, the proceeding is, as against him, a mere nullity: *Breece v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 Wis. 238, 269; *Richards v. Rote*, 68 Pa. St. 248; *Smith v. Rice*, 11 Mass. 507; *Brown v. Scoggell*, 22 N. H. 548; *Wood v. Myrick*, 16 Minn. 494; *Procter v. Newhall*, 17 Mass. 81. The statutes of Minnesota and California declare that, "before commissioners are appointed, or partition ordered by the court, notice thereof must be given to all persons interested who reside in this state, or to their guardians, and to their agents, attorneys, or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the court may direct": Cal. Code Civ. Proc., sec. 1676; Minn. Comp. Stats., ed. 1878, sec. 8, p. 597. See, also, Mass. Gen. Stats., ed. 1882, sec. 51, p. 1034; Wis. Rev. Stats., sec. 3944. In Pennsylvania notice to all persons named in the record is presumed: *Richards v. Rote*, 68 Pa. St. 248; *Vensel's Appeal*, 77 Pa. St. 71.

*Commissioners.*—Jurisdiction having been acquired over the parties interested, the court may proceed to appoint persons to make the partition. The number to be appointed differs in the different states. When appointed they are generally known as commissioners: Cal. Code Civ. Proc., sec. 1675; Howell's Mich. Stats., secs. 5967, 5968; Md. Stats., ed. 1883, sec. 10, p. 550; Code of Md., ed. 1878, secs. 32-70, pp. 407-415; Mass. Stats., ed. 1882, sec. 49, p. 1034; Tex. Stats. 1879, sec. 2109; Vt. Stats. 1880, sec. 2352; Ala. Code 1876, secs. 2496-2503; Wis. Stats., sec. 3942; but are sometimes styled distributors (Conn. Stats., ed. 1875, secs. 16, 17, p. 371), appraisers, or partitioners: Ga. Code, sec. 2585. When the estate of the decedent consists of real property situate in different parts of the state, one set of commissioners may generally be appointed for each county. Where the estate consists solely of money, no distributors need be appointed: *Davenport v. Richards*, 16 Conn. 317. In some of the states they may be appointed by the testator in his will: *Strong v. Strong*, 8 Conn. 408. Otherwise the power to appoint is vested exclusively in the court having jurisdiction to settle the estate of the decedent: *Olement v. Brainard*, 46 Conn. 179.

*Qualification of Commissioners.*—In most of the states the appointment of the commissioners is preceded by a decree of distribution, wherein the property to be divided among the heirs and devisees is described, and the respective shares or moieties of each is designated. This corresponds to the interlocutory judgment or decree of partition in other cases. A certified copy of this decree, and of the order appointing the commissioners, is issued by the clerk of the court as their warrant, and they are required to take and have indorsed on such warrant their oath that they will faithfully discharge the duties of their office: Cal. Code Civ. Proc., sec. 1675. Upon taking and indorsing such oath they are qualified, and may enter upon the discharge of their duties.

*Notice by the Commissioners.*—Before the commissioners make the partition, "notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition": Cal. Code Civ. Proc., sec. 1683; *Ragan's Estate*, 7 Watts, 438. We know of no decision determining the effect of an omission of this notice. It occurs to us, however, that this notice is not jurisdictional, because the parties in interest have already been brought into court by the notice required to be given when the application is made for the appointment of the commissioners. The failure to give this notice is unquestionably a very grave irregularity, justifying, or even requir-

ing, that confirmation of the partition be refused, and that the commissioners be directed to begin *de novo*, by giving the proper notices.

While the statute requires notice to be given to "all persons interested," we think these words are here used, and must be understood, in a qualified sense. The decree of distribution is the warrant of the commissioners and the order of their appointment. This decree is their sole guide. They have no authority to set off property to any person not named in such decree, nor in proportions variant from the shares or moieties there described. The persons named in the decree ought, therefore, to be deemed "all the persons interested in the partition," and a notice to them sufficient to sustain the subsequent proceedings of the commissioners. By establishing this rule the commissioners know, from consulting their warrant, to whom notice must be given, and persons called to examine the title may readily ascertain whether all the persons have received notice who are entitled thereto. By construing the words "all persons interested in the partition" in their literal sense the commissioners are required to assume the judicial function of ascertaining who are persons interested, a function which we think belongs exclusively to the court. If the commissioners must make this investigation, the means at their command are so inadequate that the conclusions reached by them must often be tainted with some error of law or fact, and their proceedings rendered nugatory from failure to give notice to parties who do not appear by the record to have any interest in the transaction. Whether the commissioners may rely upon the decree for information with respect to parties entitled to notice or not, it seems to be certain that they need not give notice to persons not in possession, and whose claim of title does not appear from the county records: *Merklein v. Trapnell*, 34 Pa. St. 46; 75 Am. Dec. 634.

*The Duties and Powers of the Commissioners* are probably coextensive with those of commissioners in an ordinary suit for partition. They "may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them": Cal. Code Civ. Proc., sec. 1683. We find no decision or statute directly adopting for the guidance of the commissioners, or of the court, the principles regulating partition in other proceedings, yet we apprehend that these principles are necessarily involved in the grant of power to make partition. The partition authorized is evidently one conducted according to the equitable rules long recognized in like proceedings in other courts. Thus, some of the heirs may have conveyed portions of the common property, or enhanced their value by permanent and costly improvements. If partition were enforced in law or in equity it would be the duty of the commissioners and of the court, as far as might be done without prejudice to the interests of the other heirs, to set apart to the heir thus conveying or improving some part of the common property, the part so conveyed or improved. We think the same duty arises under like circumstances when the partition is merely ancillary to the settlement and distribution of the estate of a deceased person. To hold otherwise would be to make the proceeding grossly inequitable, and render the rights of the parties dependent upon the court which happened to first acquire jurisdiction, rather than upon the established principles of jurisprudence. In making partition it is often necessary to preserve equality in value to afford some convenient mode of ingress and egress to and from some of the allotments over the others. The power to charge one of the allotments with this burden in favor of another exists when the partition is made in the distribution of the estates of a decedent. "The author-

ity to give such rights and privileges is believed to have been long and generally exercised by courts of probate in this state; and we think the authority is necessarily implied in the grant of jurisdiction to make partition and division of estates; because, in numerous cases, a judicious and convenient partition could not be made without it. In other jurisdictions the power to create such rights and privileges, on partition, by legal proceedings, has often been recognized. We are, therefore, of opinion that the probate court, upon division of deceased person's estate, may, in a case where necessity or convenience requires it, give one share a right of way over land assigned to the other shares": *Okenell v. Chapman*, 38 N. H. 17; 75 Am. Dec. 158. Where the aid of chancery was sought on the allegation that one of the heirs of a decedent, being insolvent and deeply indebted to the estate, had conveyed his share, by which means his debt to the estate would be lost unless there was some interference by a court of equity, the court held that the remedy in probate was ample because that court could distribute to the heir as his share of the estate his own debt thereto: *Bailey v. Strong*, 8 Conn. 278. Questions of advancements may be presented to the court and taken into consideration, and, when ascertained and established, must be taken into account in making a final partition of the property of the estate: Cal. Code Civ. Proc., sec. 1686; Ga. Code, secs. 2579-2583; *Sims v. Sims*, 29 Ga. 108; 99 Am. Dec. 450; Howell's Mich. Stats., sec. 5978; Conn. Stats., ed. 1875, sec. 6, p. 372; Wis. Rev. Stats., sec. 3958. All the commissioners must act, but a majority may decide and report: *Odiorne v. Seavey*, 4 N. H. 53.

The commissioners are not required to make a division of the property into equal shares when it cannot be divided without prejudice to the owners, or when, though susceptible of some division, it cannot be conveniently divided into as many parts as there are shares without making such parts of unequal value. In the latter case the commissioners are sometimes authorized to divide the estate into unequal parts, and to appraise each part, and "award that one or more purparts or shares shall be subject to the payment of such sum or sums as shall be necessary to equalize the value of the said purparts, according to the said appraisement thereof, which sum or sums shall be paid, or secured to be paid, by the several persons accepting purparts": Brightley's Purdon's Digest, sec. 163, p. 541; Cal. Code Civ. Proc. 1681. If the real estate cannot be divided "without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein who will accept it." This action of the court must, however, be based on the report of the commissioners showing that the estate cannot be divided, and appraising its value. The person who accepts it must pay the amount of the appraisement: Cal. Code Civ. Proc., sec. 1680; Me. Rev. Stats., ed. 1883, sec. 12, p. 550; *Robbins v. Gleason*, 47 Me. 271; Tex. Stats., ed. 1879, sec. 2115; Wis. Stats., secs. 3949, 3951; Howell's Mich. Stats., secs. 5972, 5973; Mass. Stats., ed. 1882, secs. 56, 57, p. 1035. When two or more persons elect to take the same parcel of land when it is assigned in several unequal parts, or to take the whole when the property is found to be indivisible, the elder heirs are given a preference over the younger, and males over females: See last citation, and Conn. Stats., ed. 1875, sec. 6, p. 372; Vt. Stats., ed. 1880, secs. 2261, 2262. In Pennsylvania any one or more of the heirs may, in writing, offer a sum in excess of the appraised value as fixed by the commissioners, and the one offering the highest price above such valuation is entitled to have the property allotted to him: Brightley's Purdon's Digest, sec. 169, p. 542. This prefer-



once given to the eldest heir seems on his dying or conveying to vest in his heir or alienee: *Harsh v. Brennenman*, 6 Serg. & R. 2; *Ragan's Estate*, 7 Watts, 438. A guardian may accept an allotment for his ward, and give a recognizance binding on the ward for the amount awarded to make the partition equal: *Gelbach's Appeal*, 8 Serg. & R. 205. The right of an heir to accept an allotment is waived by his not appearing and making his election known on the day fixed by the court for the heirs to refuse or accept the allotments: *Wentz's Appeal*, 7 Pa. St. 151.

*A Sale may be Ordered* of the whole or any part of the estate when it appears from the report of the commissioners that the land "cannot be otherwise fairly divided," or when, after due notice, the heirs refuse to take the property at the valuation fixed by the commissioners: Cal. Code Civ. Proc., sec. 1682; Brightley's Pardou's Digest, sec. 185, p. 545; Tex. Stats., ed. 1879, sec. 2120. The sale may be made by the executor or administrator, or by a commissioner appointed for that purpose: Brightley's Pardou's Digest, sec. 186, p. 546; neither of whom has any authority to alter the terms of the sale as fixed by law or the order of court: *Rehelman v. Witmer*, 2 Watts, 263; *Vandever v. Baker*, 13 Pa. St. 126.

*The Commissioners Must Report Their Proceedings* to the court by which they were appointed: Cal. Code Civ. Proc., sec. 1684; Ga. Code, 2586. When they find in favor of a partition by sale they must report that fact to the court, and must generally set forth the facts from which their conclusion has been drawn, in order that the court may judge of its correctness and determine whether to assent thereto. If, on the other hand, they make an actual division of the property, their report ought to describe, with as much particularity as in other partition proceedings, the allotments made to the respective parties among whom they were directed to make partition.

*Vacating or Confirming.*—When the commissioners have made their report it is next brought before the court for final action. It may, for any proper reason, be set aside and the partition recommitted to the same or other commissioners. The grounds for moving to set aside the report necessarily resolve themselves into two classes, viz., for irregularities in the proceedings, or because the partition or other action of the commissioners is unequal or unjust. Thus, the partition may be set aside because the commissioners were not sworn as required by the law: *Ela v. McConihe*, 35 N. H. 279; and, doubtless, because of any other substantial departure from the requirements of the statute. The court will rarely interfere with the action of the commissioners where there is no accusation of intentional misconduct, because it prefers to rely on their judgment as practical men who have been selected on account of their ability and experience, and who have, upon personal inspection, made themselves acquainted with the property in question. Nevertheless, the court will refuse to confirm their action whenever satisfied of its unjustness or partiality: *Webster v. Merriam*, 9 Conn. 225; *Young v. Bickel*, 1 Serg. & R. 467. "Where an estate is manifestly and greatly undervalued, I have no doubt but it is the duty of the court to set aside the inquest. But it ought to be a clear case. The jury are intrusted by law with the valuation, and they act upon oath. Besides, it is generally to be supposed that they are better judges of this matter than the court. Great regard should, therefore, be paid to their opinion": *Rez v. Rez*, 3 Serg. & R. 535. "An inquest may be set aside where the jury has made a plain mistake of fact or law, or where fraudulent acts have been practiced by an interested party to procure such a report as he desires. A valuation of land at a grossly inadequate price may be evidence of mistake or fraud": *Kreider's*

**Estate, 18 Pa. St. 374.** "The orphans' courts proceed on chancery principles; and if it appears that the inquest acted on erroneous principles, or if it appeared that there was a great inequality in the division or valuation, their powers are sufficiently extensive to afford relief": *Rex v. Rex*, 3 Serg. & R. 538. If, for any cause, the proceedings are vacated and there has been any charge of misconduct on the part of the commissioners the general practice is to appoint new commissioners instead of recommitting the partition to those first appointed: *Pickering v. Pickering*, 20 N. H. 541. If no sufficient cause is shown for setting aside the report the court makes an order confirming or approving it, and thereupon the partition becomes final, and the parties are invested with title in severalty to their respective allotments.

**The Effect of the Partition.**—When land has been awarded to one of the heirs on payment of a sum of money the payment must be made, or secured, in the manner designated by statute, before the title vests in such heir: *Thayer v. Thayer*, 7 Pick. 209; *Jenks v. Howland*, 3 Gray, 536; *Baxington v. Clarke*, 2 Pen. & W. 115; 21 Am. Dec. 432; *Smith v. Scudler*, 11 Serg. & R. 325; *Bellas v. Evans*, 3 Pen. & W. 479. In Pennsylvania the security must be "by recognizance, or otherwise, to the satisfaction of the court." When security by recognizance is taken, it operates as a lien on the lands: *Kean v. Franklin*, 5 Serg. & R. 147; *Share v. Anderson*, 7 Serg. & R. 43; 10 Am. Dec. 421; *Cubbage v. Nesmith*, 3 Watts, 314; *Riddle's Appeal*, 37 Pa. St. 177. "The persons to whom, or for whose use, payment or satisfaction shall be so made, in any of the cases aforesaid, for their respective parts or shares of such real estate, shall be forever barred of all right or title to the same": *Brightley's Purdon's Digest*, sec. 162, p. 541; *Merklein v. Trapnell*, 34 Pa. St. 42; 75 Am. Dec. 634.

Proceedings for partition in connection with the settlement of the estates of deceased persons must, upon principle, be regarded as binding and conclusive to the same extent as other legal proceedings. When the court has jurisdiction of the subject matter, and of the persons of its owners, its final judgment operates to vest the title to the several allotments in the persons to whom they are respectively allotted. "There is no reason why a decree of partition in the probate court should be any less conclusive upon the parties than a judgment in a real action. To permit one claiming under a party to such partition to again litigate the title would manifestly violate the maxim which declares that public interest requires an end to litigation": *Carpenter v. Green*, 11 Allen, 28; *Mass. Stats.*, ed. 1882, sec. 63, p. 1036; *Howell's Mich. Stats.*, sec. 5980. All the incidents and appurtenances of each allotment vest in the person to whom it is assigned. "Unless there be some reservation or order made by the committee, the buildings, fences, trees, stone, manure, etc., that are upon one part go to him to whom the part is assigned": *Plumer v. Plumer*, 30 N. H. 570; and his title is paramount to any conveyance made by any of his coheirs: *Steel's Appeal*, 86 Pa. St. 222; *Holcomb v. Sherwood*, 29 Conn. 418. The partition is binding on minors, and cannot be disaffirmed by them on attaining their majority: *Gelbach's Appeal*, 8 Serg. & R. 205. It may be impeached for fraud. Thus, in *Mitchell v. Kintzer*, 5 Pa. St. 216, 47 Am. Dec. 408, in determining that evidence ought to have been received to impeach a partition for fraud, said: "The evidence so offered by the defendants was rejected by the court below, and the learned counsel for Kintzer contended here that the court below were right, because the proceedings and decree of the orphans' court could not be impeached by parol, or for any cause, but imputed absolute verity, and vested the title in James Mitchell and his heirs, irrespective of and beyond all the circum-



stances which might have attended the transaction. But, in the eye of the law, fraud spoils every thing it touches. The broad seal of the commonwealth is crumbled into dust as against the interest intended to be defrauded. Every transaction between individuals in which it mingles is corrupted by its contagion. Why, then, should it find shelter in the decrees of courts? There is the last place on earth where it ought to find refuge. But it is not protected by record, judgment, or decree; whenever and wherever it is detected its disguises fall from around it, and the lurking spirit of mischief, as if touched by the spear of Ithuriel, stands exposed to the rebuke and condemnation of the law."

If, as we have hereinbefore stated the rule to be, the probate court considers the legal title only, a decree of partition cannot affect equitable rights or interests, nor defeat their subsequent assertion against parties whose legal titles were subject thereto before the partition was made: *Caperton v. Hull*, 83 Ala. 171. There may, perhaps, be cases in which, though the proceedings for partition were in themselves absolutely void, the title of parties taking and holding possession thereunder cannot be assailed because great lapse of time or other circumstances may indicate that all the parties in interest either agreed upon, or acquiesced in, the partition made for them. Such partition may, therefore, be treated as of equal dignity and force with a partition by parol, which, it is well known, will not be disturbed if the parties have taken and long held possession pursuant thereto: *Obermiller v. Wyllie*, 36 Fed. Rep. 641; *Freeman on Cotenancy and Partition*, secs. 396-398.

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## MARTIN v. DEETZ.

[102 CALIFORNIA, 55.]

**CORPORATIONS, DEFECTS IN ORGANIZATION OF.**—The formation of a corporation cannot be accomplished except by a substantial compliance with the statute.

**CORPORATIONS.—THE FAILURE TO FILE ARTICLES OF INCORPORATION IN THE OFFICE OF THE COUNTY CLERK OF THE COUNTY** which is designated in such articles as being the place where the principal business is to be transacted, though such articles are filed in the office of the county clerk of another county, and a certificate is issued by the secretary of state in due form of law, stating that such articles had been filed in the proper county, is fatal to the existence of a corporation *de jure*.

**CORPORATION DE FACTO, EXISTENCE OF, WHEN MAY BE PUT IN ISSUE.**—

Under a statute declaring that if a corporation does not organize within one year from the date of its incorporation its corporate power shall cease, but that the due incorporation of any company claiming in good faith to be a corporation and doing business as such, and its right to exercise corporate powers, shall not be inquired into collaterally in a private action to which such corporation *de facto* may be a party, but such inquiry may be had at the suit of the state on the information of the attorney general, the mere filing of a complaint in which the company is averred to be a corporation does not estop all the world, except the state, from denying the existence of such a corporation. The averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*. Where there is no corporation

*de jure* there cannot be a corporation *de facto*, unless the alleged corporation has at least attempted to do some corporate act or to exercise some corporate power.

**CORPORATIONS.—AN ACTION FOR DAMAGES FOR PREVENTING THE FORMATION OF A CORPORATION**, if it can be maintained at all, can be sustained only by some natural person injured thereby, and not by or in the name of the corporation which was prevented from being incorporated.

**DAMAGES.—PROSPECTIVE PROFITS** are not allowed as damages for a tort or for the breach of a contract, unless they are the clear, proximate, and natural results of the wrong, and are confined to the principal thing complained of and to its naturally attendant circumstances.

**DAMAGES.—FOR THE FAILURE OF A PERSON TO ACT AS A DIRECTOR OF A CORPORATION** or to assist in its organization, the damages recoverable against him cannot include loss sustained by reason of the principal incorporators being in indigent circumstances and unable to raise moneys to continue the business, and their consequent loss of profits which they might have realized had such business been continued.

*T. M. Osmont, Proctor and Mahoney, Warren and Taylor, George A. Proctor, and D. I. Mahoney*, for the appellants.

*Maxwell and McEnerney, Gillis and Tapscott, L. F. Coburn, J. F. Farragher, J. F. Lodge, Brown and Farragher, and Whitworth and Shurtleff*, for the respondent.

57 **McFARLAND, J.** This action was brought by the plaintiffs against Alva Jacob Deetz, George Lewis Deetz, Susanah D. Hathaway, Mary Polly Metcalf, Mary Elizabeth Deetz, and Henry John Deetz, who are called in the papers the Deetz family, upon a note and mortgage made by them on April 15, 1891, for \$22,000, to M. A. Harding, and assigned by the latter to the Bank of California, and by said bank to the plaintiffs herein. The mortgage was upon certain timber lands, with a sawmill thereon, owned by said Deetz family. The Deetz family, in their answer, set up certain defenses, and, upon certain 58 allegations made therein, the court ordered that the said M. A. Harding, and an alleged corporation called the Deetz Mill and Lumber Company, be made parties to the action. Thereupon, the said Deetz Mill and Lumber Company filed a cross-complaint, to which answers were made by the plaintiffs and also by said M. A. Harding. The court first heard the issues made by the cross-complaint and answers thereto. It then considered the defenses set up by the Deetz family in their answer, and gave judgment in their favor that the plaintiff take nothing by this action. The principal contest here is made upon the cross-complaint of the said Deetz Mill and Lumber Company, and upon the findings made by the court upon the issues made by said

cross-complaint and the said answers thereto. The court found that said Harding had done certain acts which caused damage to the said mill and lumber company to the extent of \$20,000; gave judgment for said amount in favor of said cross-complainant and against said Harding for said amount of \$20,000, and ordered that said damages should be, substantially, applied to and deducted from the amount of said mortgage. The court found that the acts of said Harding, upon which is based said damages, were known to the plaintiffs at the time they acquired said note and mortgage; and, therefore, the case was treated practically as if the suit had been brought by said Harding himself. The plaintiffs and said Harding appeal from the judgment upon the judgment-roll, which includes findings. The findings follow in the main the averments of the cross-complaint; and appellants contend that their demurrer to the cross-complaint should have been sustained, and that the findings are not sufficient to warrant the judgment. The facts alleged and found are numerous and complicated, and it would be impossible to state them all here without exceeding all reasonable length. We will confine ourselves to those which are absolutely necessary to an understanding of the case.

The note and mortgage sued on were given in lieu of <sup>59</sup> and to take up two other notes of the Deetz family, one given to F. N. Handy for \$10,000, and another to said M. A. Harding for \$7,785, which were secured by mortgages on the land covered by the mortgage here in suit. The Deetz family had been operating a sawmill on the mortgaged premises, and were very much involved in debt; and, being thus embarrassed, on or about February 20, 1891, they applied to one George F. Day for aid and assistance, and a certain written contract was entered into between them and the said Day, which is called in the pleadings and findings "Exhibit A." This "Exhibit A" was made by said Day, party of the first part, and the said persons called the Deetz family, as aforesaid, parties of the second part; and by said contract it was agreed that they should organize a corporation to be called the Deetz Mill and Lumber Company, for the purpose of carrying on the manufacturing of lumber, the capital stock to consist of \$20,000, divided into 200 shares of \$100 a share, and that one-half of said shares should be issued to said Day, and the other half to said Deetz family; and the said Deetz family were to convey the premises described in the complaint herein

to said corporation. It was further provided that Day was to give his time and attention to the business, and to act as superintendent, and his said one-half of the stock should be placed in the possession of George H. Maxwell, in escrow, as security for his performance of the contract; but it was further provided that said stock might be hypothecated as security for any money borrowed by Day and advanced to said company. It was further provided, also, that any profits which the stockholders would be otherwise entitled to as dividends should be first applied to said mortgages given to Handy and to Harding as aforesaid. (It was also agreed by the said Deetz family, in another instrument executed about the same time, that Harding might substitute the \$22,000 note and mortgage sued on in this action for the said other two mortgages given to Handy and Harding as aforesaid; and it was agreed by said Day in another instrument <sup>60</sup> of writing that the note and mortgage herein sued on should precede and take precedence over any rights of the parties accruing under said "Exhibit A.") In pursuance of said "Exhibit A," the parties thereto undertook to form a corporation; and said Harding agreed to become a director of said corporation for the first year, and for that purpose was to have a share of stock, and he did sign the articles of incorporation, which provided that he should be one of five directors for the first year. The property above described, belonging to the Deetz family and mortgaged as aforesaid, was situated in the county of Siskiyou, in which county the business of the said corporation to be formed was to be carried on. Articles of incorporation were prepared and properly signed, showing that the principal place of business of the intended corporation was in the county of Siskiyou, but the said articles were not filed, and never were filed in the clerk's office of said county of Siskiyou. They were filed in the clerk's office of the city and county of San Francisco, and a copy thereof was certified by the clerk of said city and county to the secretary of state, who issued a certificate of incorporation, reciting that they were certified by the county clerk of Siskiyou. Afterwards a copy of the certificate of the secretary of state was filed with the county clerk of Siskiyou county. The other four directors were said Day, one J. O. Whitney, and Alva J. D. Deetz, and George L. Deetz, two of the said Deetz family. But nothing more was done towards organizing the

corporation; and the Deetz family never conveyed the property to said company.

It is alleged in the cross-complaint, and found by the court, that, after the filing of the articles of incorporation, Harding conceived the fraudulent purpose of preventing the organization of the corporation, and of throwing its business into confusion and injuring its credit, so that it could not continue its business, and he would be able to foreclose his mortgage and secure the whole property, "the value of which greatly exceeded the amount of said mortgage." And for this purpose—as it is averred and <sup>61</sup> found—he refused to meet or act as a director, or in any way to participate in the organization of the corporation; and he also, as averred, falsely represented to the Deetz family that Day intended to rob said family of all interest in the corporation, and in said property, and to "ruin them all"; and that the only way for the Deetzes to protect themselves was for George and Alva Deetz, who were named as directors, to refuse to act as directors and prevent the organization of the corporation. The Deetz family were thus induced to act as advised by Harding; and George and Alva refused to meet or act as directors, and in this way they and Harding prevented the organization of the corporation. However, after the filing of the articles of incorporation, the Deetzes and Day commenced, and for several weeks continued, the business of manufacturing lumber at the mill; but at the end of that time, owing to their unpaid liabilities, and particularly to their pressing need of \$3,000, they were compelled to quit, and the business and property went into the hands of a receiver.

The court attributes the failure of the corporation to organize entirely to Harding; and finds that the failure to organize prevented the borrowing of said \$3,000, which would have enabled the company to go on with its business. It is found that "arrangements had been made by said Day" to advance \$3,000 to the company, provided shares of stock had been issued to him, which he could have hypothecated as security for a loan; but as the directors would not meet or organize there could be no certificates of stock, and therefore no loan. And so the business was thus stopped by the said acts of Harding, to the great damage, as is alleged and found, of said alleged corporation. As damages it is found that for four months after the mill stopped it could have cut one million feet of lumber per month at a cost of \$6.50 per thou-

sand; that the stumpage would have been \$2 per thousand; that there could have been realized therefor \$13 dollars per thousand; and that therefore the net profit for the four months would have been \$18,000. <sup>62</sup> Other alleged damages for the forced sale of certain green lumber and injuries to logs from exposure to the weather are found to be \$2,000—making in all \$20,000; and for this \$20,000 judgment is rendered for the said mill and lumber company against Harding, and it is decreed that it be applied as payment on the amount of principal and interest due on said mortgage for \$22,000, upon which this action was brought.

The first contention made by appellants is that the Deetz Mill and Lumber Company, the cross-complainant, never was a corporation, either *de jure* or *de facto*, and, therefore, cannot maintain this or any action. This contention is, in our opinion, a sound one.

It is quite clear that the cross-complainant was never a corporation *de jure*. Under our system of incorporation, through general laws, a corporation *de jure* is an artificial body created by operation of law upon the execution, filing, and certification of certain written instruments by persons desirous of incorporating, and certain public officers, in accordance with the provisions of such general laws. When these instruments are executed, filed, and certified as required the corporation, *eo instante*, comes into legal existence. Its corporate life is then complete, without any further act or user; and it can be destroyed only by some subsequent act of forfeiture. The corporation is then regularly formed. But this result can be accomplished only by compliance with the prerequisites of the statute. It may be conceded that a substantial compliance is sufficient; but it is clear that a necessary prerequisite cannot be omitted. Under our code the first necessary thing to be done, after signing and acknowledging the "articles of incorporation" by the parties, is to file that instrument "in the office of the county clerk of the county in which the principal place of business of the company is to be transacted," and to have a certified copy thereof made by said clerk and sent to the secretary of state: Civ. Code, sec. 296. These are conditions precedent in that statutory process by which <sup>63</sup> an artificial person existing only in legal contemplation can be created. We are dealing now entirely with the notion of a corporation *de jure*, and leaving out of view the rights which an irregularly formed

body may acquire as a corporation *de facto*; and we have been referred to no case where a corporation has been held to have been regularly and legally created without filing its original articles in the office of the clerk of the proper county. No doubt, in such a case, subsequent acts might give the body rights as a corporation *de facto*. We have nothing to do with the reason why the legislature made this requirement; although it may be said that a fundamental characteristic of a corporation has always been that it must have a place: Angell and Ames on Corporations, sec. 103. And it is quite reasonable that the articles should be filed at that place. At all events, the whole process is an artificial one, and the requirement mentioned is an essential part of that process by which an imaginary, invisible, intangible, legal entity is brought into contemplative existence.

As to the necessity of filing the articles with the proper county clerk, the law, as deduced from the authorities cited, is thus stated in Morawetz on Corporations, section 27: "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate, or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and until it has been performed the association will have no right whatever to assume corporate franchises." And again, the same author says: "In order to prove the existence of a corporation *de jure*, i. e., a corporation having a legal right to exist, it is necessary to prove not only the existence of the corporation *de facto*, but also the legislative authorization of its existence. A public law authorizing the formation of a corporation will be judicially recognized <sup>64</sup> without proof; but proof would be necessary to establish that a corporation was formed pursuant to the law, and that any conditions precedent to the legal right of forming a corporation have been fulfilled." Our code provides that the original articles of incorporation shall designate the place where its principal business is to be transacted (Civ. Code, sec. 290); and that they shall be filed with the clerk of the county where such business is to be done. In the case at bar the articles set forth the principal place of business as in Siskiyou county; and they were filed, not in Siskiyou county, but in the city and county of San Fran-



cisco. This was an entire failure to comply with the necessary prerequisite of the statute; and the cross-complaint never became a corporation *de jure*.

But respondent also relies upon the doctrine that the existence and acts of a corporation *de facto* can be inquired into only by the state. This is, no doubt, true. The rule is stated in the second sentence of section 358 of the Civil Code. The whole section is as follows: "If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation its corporate powers shall cease. The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally, in any private action to which such *de facto* corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney general." This does not mean, however, that whenever a pleading is signed and filed in an action by an attorney at law in which some named company whom he appears for is averred to be a corporation, all the world except the state is at once estopped from denying the existence of such a corporation. In referring to this section this court, in *Oroville etc. R. R. Co. v. Plumas County*, 37 Cal. 360, per Rhodes, J., said: "This provision does not go to the extent of precluding a private person <sup>65</sup> from denying the existence *de jure* or *de facto* of an alleged corporation. It cannot be true that the mere allegation that a party is a corporation puts the question whether it is such a corporation beyond the reach of inquiry in a suit with a private person. It must be a corporation either *de jure* or *de facto*, or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action by a corporation that the plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation. . . . To say that the 'due incorporation' cannot be inquired into does not mean that no inquiry can be made as to whether it is a corporation."

An averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*; and its existence does not consist in the mere assertion of its existence in a pleading. What is a corporation *de facto*? It exists where a number of persons have organized and acted as a corporation; have put on the habiliments of a corpora-

tion; have assumed the form and features of a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body. Nothing of this kind was done by the Deetz Mill and Lumber Company. The court finds, it is true, in general terms, that said company became and is a corporation, and has claimed in good faith to be such, and has done business as such, and that "under, and in pursuance of said contract, 'Exhibit A,' entered into the possession of the mill," and manufactured lumber "under the management of said Day as provided in said contract"; but this general finding is inconsistent with the specific findings and averments, which show what was and what was not done in the premises. And it is clear from those other findings, and from the averments of the cross-complaint, that said Deetz Mill and Lumber Company never did <sup>do</sup> any corporate act or exercised any corporate power. Indeed, it was impossible, under the circumstances, for it to have done so; for it was never so organized that it could have acted, or could have pretended to act, as a corporate body. The directors named in the articles for the first year never met or acted, but deliberately refused to do so; no stock was ever issued; no by-laws were ever passed; no seal was adopted; no persons ever met, or pretended to meet, in corporate body assembled; no officers were ever elected; no person was ever appointed by the asserted corporation to represent it in any way, or to act as its agent; no journal or record of the proceedings of the body corporate was ever kept; and it was never in a position to exercise, or to pretend to exercise, any of the powers granted to corporations by title I, part 4, of the first division of the Civil Code. The first sentence of section 358, above quoted, provides that if a corporation does not "organize" within a certain time its corporate powers shall cease; and the second sentence which provides that the "due incorporation" of a company and "its right to exercise corporate powers" shall not be inquired into by a private party in a suit to which "such *de facto* corporation" is a party, evidently refers to a corporation which has not failed to "organize," and which does "exercise corporate powers," and thus becomes and is a *de facto* corporation. In all the cases where a party to a suit has been held to be a *de facto* corporation it has appeared that such party had assumed, in

some way, the appearance of a corporation, and had pretended to act as a corporate body. For instance, in *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, Mr. Justice Paterson, in delivering the opinion of the court, says: "We think that the evidence in support of the finding that the plaintiff was a corporation, acting in good faith as such, is sufficient. It was recognized in the community as a corporation; the records of its proceedings show that it was so acting; and in all its dealings it was styled as a corporation; it has pursued corporate forms of action, held corporate meetings, <sup>67</sup> and, we think, comes within the provisions of section 358 of the Civil Code." No part of this language would apply to the cross-complainant in the case at bar. Indeed, a thorough consideration of the cross-complaint itself shows that the burden of the grievance alleged is that Harding prevented the Deetz Mill and Lumber Company from acting or being a corporation *de facto*, or at all. But, if any legal damage arose from such act of Harding, it could be recovered only by some of the natural persons whom he prevented from forming such corporation; it could not be recovered by an alleged artificial person not *in esse*.

The foregoing views are determinative of the case against the cross-complaint, and make necessary a reversal of the judgment.

The judgment in favor of the cross-complainant, however, would have to be reversed on other grounds. The legal wrong which Harding did, if he did any, consisted in his refusal to meet and act as a director. The averment that he persuaded the Deetz family to help to prevent the organization of the corporation can hardly be considered as of any value. It is averred that he did this "by false and fraudulent misrepresentations to said Deetz family as to the purposes and intentions of said Day." But there are no facts stated as to the nature of said misrepresentations. The finding is that the misrepresentations were that "Day intended to and would, if said company was organized, deprive and rob said Deetz family of all interest in said corporation and in said Deetz property, and ruin them all." This is very general; and it amounts to little more than mere business advice as to a matter about which the Deetzes had as good opportunity as Harding to form an opinion. But if we were to waive all other points, and assume that it was Harding's duty to assist in the formation of a mere *de facto* corporation, and

that his refusal to meet with the other directors, and his advice to the Deetzes not to so meet, were wrongful acts, and the cross-complainant<sup>68</sup> could recover for any damages resulting from said acts, still we see no just basis for the measure of damages by which the amount of the judgment was arrived at. Of course, prospective profits are sometimes allowed as damages for breach of contract or tort; but they must be the clear, proximate, and natural results of the wrong, and must be confined to the principal thing complained of, and to its naturally attendant consequences: 2 Greenleaf on Evidence, sec. 256; *Anderson v. Taylor*, 56 Cal. 132; 38 Am. Rep. 52. The rule stated by our code is, that for a breach of a contract the measure of damages is "the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom: Civ. Code, sec. 3300; and for a tort, "the amount which will compensate for all detriment proximately caused thereby." Remote results, produced by intermediate sequences of causes, are beyond the reach of any just and practicable rule of damages: *Friend and Terry Lumber Co. v. Miller*, 67 Cal. 464. "Each cause produces results that in time alone, or by combination with other causes, produce other effects, and so on *ad infinitum*": Field on Damages, sec. 10; and in the case at bar, between the alleged wrong of Harding in refusing to act as director, and the final damages alleged to have been caused by the results of the financial embarrassment of the Deetz company, there is a series of consecutive causes and effects which carries those alleged damages so far away from the alleged wrong as to make them entirely too remote to be called in any sense "proximate." They are entirely too contingent, speculative, indirect, and uncertain, to come within any legal measure of damages. The judgment allows full prospective profits that might possibly have been made out of the timber and the mill during four months, while the timber and the mill still remain with the same possibility of making in the future the very profits for which the judgment was rendered. And it is a curious result that the Deetzes reap the main<sup>69</sup> advantage of an alleged wrong which they themselves helped to perpetrate, and which they could easily have prevented. By the judgment they got their note and mortgage for twenty thousand dollars almost entirely wiped out merely because Harding refused to act as director; when, if they had acted with the other two directors, Day and Whitney, the corpo-

ration would have been organized, and the alleged consequent calamities averted, despite the action of Harding. The excuse that the latter tempted them is not very cogent.

Our conclusion is, that, upon the cross-complaint and findings, the judgment should have been against the cross-complainant, and in favor of plaintiffs and defendant Harding.

The case has been argued on both sides almost entirely upon the issues made by the cross-complaint and the answers thereto, and as if the determination of those issues would be determinative of the whole case. Appellants contend that, upon a reversal of the judgment in favor of the cross-complainant, the court below should be directed to give judgment foreclosing the mortgage as prayed for in the complaint. The judgment, as a whole, no doubt so involves the rights of all parties that it must stand or fall as an entirety, and its reversal will perhaps practically end the litigation; but upon the record we do not see our way clear to direct the court below to at once enter a judgment in favor of plaintiffs and against the Deetzes foreclosing the mortgage. Upon that branch of the litigation the cause must be remanded for further proceedings.

The entire judgment is reversed, with directions to the court below to dismiss the cross-complaint of the so-called Deetz Mill and Lumber Company, with costs to plaintiffs and defendant Harding; and with respect to the defendants, Alva Jacob Deetz, George Lewis Deetz, Susannah D. Hathaway, formerly Deetz, Mary Polly Metcalf, formerly Deetz, May Elizabeth Deetz, and Henry Deetz, the cause is remanded for further proceedings in accordance with this opinion.

<sup>70</sup> DE HAVEN, J., FITZGERALD, J., PATERSON, J., GAROUTTE, J., and HARRISON, J., concurred.

Rehearing denied.

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**CORPORATIONS—ORGANIZATION OF.**—To acquire the right to be a corporation, the prescribed statutory conditions must be substantially complied with: *People v. Montecito Water Co.*, 97 Cal. 276; 33 Am. St. Rep. 172, and extended note; *Walton v. Oliver*, 49 Kan. 107; 33 Am. St. Rep. 355; *Mohamms Hill Min. Co. v. Woodbury*, 14 Cal. 424; 73 Am. Dec. 658, and note.

**CORPORATIONS—FAILURE TO FILE ARTICLES.**—EFFECT: See the extended note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 179.

**CORPORATIONS DE FACTO.**—To give a body of men the status of a *de facto* corporation there must have been an apparent attempt on their part to perfect a corporate organization under statutory authority, and a user of corporate powers pursuant to such attempted organization. If these conditions are satisfied it is not necessary that there should be a full, or even a substan-

tial, compliance with the provisions of the law: *Finnegan v. Neerensberg*, 52 Minn. 239; 38 Am. St. Rep. 552, and note.

**DAMAGES—PROSPECTIVE—LOSS OF PROFITS FROM BREACH OF CONTRACT.** Prospective profits are not proper elements to be computed in assessing damages for a breach of contract, but profits which are the direct results and fruits of the contract may be assessed for a breach thereof: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note; *Cannon v. Folsom*, 2 Iowa, 101; 63 Am. Dec. 474, and note; *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 438; *Masterton v. Mayor*, 7 Hill, 61; 42 Am. Dec. 38, and note; *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718, and extended note; *Simmons v. Brown*, 5 R. I. 299; 73 Am. Dec. 66, and note; *Adams Express Co. v. Egbert*, 38 Pa. St. 360; 78 Am. Dec. 382, and note. See, also, the extended notes to *McKinnon v. McEwan*, 42 Am. Rep. 461, and *Sitten v. Macdonald*, 60 Am. Rep. 488.

## IN RE WILLIAMS.

[102 CALIFORNIA, 70.]

**ADOPTION OF MINORS, EXTRINSIC EVIDENCE IN SUPPORT OF.**—Though the order directing that a child be henceforth regarded and treated as the child of other persons named therein contains no statement as to the residence of the adopting parents, or as to whether or not the parties were examined separately or otherwise by the judge making the order, these facts may be proved by extrinsic parol evidence, and the order be thereby shown to be valid, unless the statute requires them to appear upon the face of the adoption papers.

**JURISDICTION, EXTRINSIC EVIDENCE IN SUPPORT OF.**—Facts necessary to show that a court or board of limited or special jurisdiction has acted within its jurisdiction may be proved by other competent evidence in the absence of a statute requiring such facts to appear in the minutes or other records of its proceedings.

**THE ACT OF THE ADOPTION OF A MINOR IS NOT A JUDICIAL PROCEEDING** in California, and the order therefor is in no sense to be considered as the judgment of a court.

**ADOPTION OF MINORS.—ESTOPPEL.**—The person adopting a minor child and procuring the order for such adoption, and all others claiming as his heirs, are estopped from denying that he was a resident of the county as alleged in his petition for such adoption.

**JOINT ADOPTIONS.**—The adoption of a minor child purporting to be the joint adoption of a husband and wife is valid under a statute giving any adult person the right to adopt the minor child of another with the consent of the wife or husband of the adopting person if capable of giving such consent.

**ADOPTION—EXAMINATION OF THE PARTIES.**—THE ADOPTION OF A MINOR CHILD CANNOT BE DEFEATED by the fact that the judge signing the order of adoption failed to separately examine the parties to it. The provision of the code requiring the parties to be examined separately is directory.

**ADOPTION—ESTOPPEL.**—IF AN ADOPTING PARENT VOLUNTARILY ENTERS INTO A CONTRACT OF ADOPTION AND RECEIVES in his lifetime the benefit

from the relation thus created, his heirs, after his death, will not be permitted to avail themselves of mere technical departures from the directions of the statute to defeat the rights of the minor child growing out of that contract.

**ADOPTION WITHOUT THE CONSENT OF THE PARENT—RETROACTIVE STATUTES.**—A statute regulating the subject of the adoption of minors may authorize such adoption to be made without the consent of, and without notice to, a parent who has been adjudged guilty of adultery and against whom a decree of divorce has been entered for that reason, and such statute operates retroactively so far as to include persons who have been thus divorced before its enactment.

**ADOPTION OF MINORS—PARENT'S RIGHT TO CONTEST.**—The fact that the father of a minor might have objected to an order of adoption, and claimed with success that his parental rights could not be impaired thereby, does not entitle the heirs of the adopting parent to avoid the adoption after the death of the natural parent. His rights would not be impaired by permitting the adopted child to succeed to the estate of the adopting parent.

**CONFLICT OF LAWS.**—THE ADOPTION OF A MINOR AUTHORIZED BY THE LAWS OF THE STATE GIVES IT THE STATUS of a child of the adopting parent, and this *status* and the consequent capacity to inherit from the adopting parent will be recognized and upheld in every other state so far as they are not inconsistent with its own laws and policy.

**WILLS, WHO MAY NOT CONTEST.**—After the adoption of a minor who, by the laws of the state, is entitled to succeed to the estate of its adopting parent, his other relatives have no capacity to contest his will, nor to oppose any disposition of his estate to which the adopting child does not object.

*Johnson, Johnson, and Johnson, and John W. Armstrong, for the appellants.*

*A. C. Freeman and McKune and George, for the respondents.*

<sup>74</sup> DE HAVEN, J. Appeals from two orders of the superior court of Sacramento county, making partial distribution <sup>75</sup> of the estate of Lewellyn Williams, deceased, to Lucy W. Auzerais and Sophia G. Cutter. The orders are based upon separate petitions, but both appeals can be properly disposed of by a consideration of the questions arising upon the appeal from the order made in favor of the respondent, Auzerais.

Lewellyn Williams died testate, and Lucy W. Auzerais is named in his will as a residuary legatee. This will was admitted to probate in the superior court of Sacramento county. Prior to the commencement of this proceeding, and in her petition asking for a partial distribution of the estate to her, the respondent, Auzerais, alleges, in addition to the foregoing facts, that she is the adopted child of said deceased, and that



he never had any other child, and was unmarried at the time of his death.

The appellants, claiming to be respectively the nephew and niece of the deceased, appeared in opposition to the application for partial distribution, and filed an answer to the petition therein, in which they denied that the respondent, Auzeais, was ever adopted by the deceased as his child, and also denied that the deceased died testate; and in this connection they further alleged the pendency of a proceeding instituted by them to revoke the probate of the alleged will of the deceased.

The issues thus made by the petition and answer thereto were tried by the court, and findings of fact filed to the effect that the petitioner was duly adopted by the deceased as his child on August 17, 1875, and that she was and is his only child, and the court further found the allegation of the answer, in reference to the pendency of the proceeding to revoke the probate of the alleged will of the deceased, to be true.

The appellants insist that the finding in reference to the adoption of the respondent, Auzeais, is not justified by the evidence, and also that the court erred in admitting evidence to prove that fact, and the questions thus presented are the only ones we deem it necessary to consider in this opinion.

76 The respondent, Auzeais, was the daughter of Eliza J. and George W. Strickland. Her parents were divorced in the state of New York, on the ground of the adultery of the father, and by that decree the care and custody of the respondent was awarded to the mother. At the time of the alleged adoption she was of the age of ten years and about eight months, and was then living in Sacramento county with the deceased, who was her uncle and also her guardian. The mother was dead, and her father was a resident of the state of New York. The adoption papers consist of a petition by the deceased, Lewellyn Williams, and his wife, Lucy C. Williams, which recites that the petitioners are residents of the county of Sacramento, and also contains an averment of the death of the mother of respondent, and of the fact that she had been divorced from the father on the ground of his adultery; second, a joint agreement by the deceased and his wife to adopt the respondent; third, the order of adoption made by the judge, and dated August 17, 1875. The order, after reciting the facts of the presentation of the petition of the deceased and his wife, and their agreement to adopt, and

that it was proven that the mother of respondent was dead, and had been divorced as stated in the petition, concludes as follows: "And the said Lewellyn and Lucy C., his wife, and said child, all being present, and being fully satisfied that the interests of said child will be promoted by such adoption;

"It is hereby ordered, adjudged, and decreed that said Lucy W., child aforesaid, shall, from now henceforth, be regarded and treated in all respects as the child of said Lewellyn Williams and Lucy C. Williams, his wife."

The order makes no mention of the fact of the residence of the adopting parents, and fails to state that any of the parties were examined separately or otherwise by the judge making the order, but it was proven by oral evidence upon the trial of the present proceeding that the adopting parents were residents of the " " county in which the order of adoption was made, and that all the parties were examined by the judge at the time, but not separately.

This evidence was properly admitted, and the contention of appellants that the order of adoption is void because it does not show upon its face that the deceased and his wife resided in the county of Sacramento at the time of the adoption, and that all the parties to that proceeding were examined by the judge in the manner directed by section 227 of the Civil Code, cannot be sustained. Undoubtedly, under section 226 of that code it is a material fact, and necessary to the validity of an order consenting to the act of adoption, that the adopting parent and the judge making the order shall both be residents of the same county: *Ex parte Clark*, 87 Cal. 638; but the statute does not require that this fact shall appear upon the face of what may be termed the adoption papers. The only memorial of the proceeding which is required by the chapter of our Civil Code relating to adoption is the written consent of the parties whose consent is made necessary by the law, and the order of the proper judge "declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting": Civ. Code, secs. 226, 227.

This being so, it is evident that extrinsic evidence should be received for the purpose of proving any other matter, the existence of which is necessary to the validity of the proceeding. It has been held, and, we think, correctly, that facts necessary to show that a court or board of special or limited power has acted within its jurisdiction may be proven by

other competent evidence, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings: *Jolley v. Foltz*, 34 Cal. 321; *Reclamation District v. Goldman*, 65 Cal. 638; *Van Deusen v. Sweet*, 51 N. Y. 378; *Williams v. Cammack*, 27 Miss. 209; 61 Am. Dec. 508; 2 Freeman on Judgments, 4th ed., sec. 518. It is true the act of adoption in this state is not a judicial proceeding, <sup>78</sup> and the order, therefore, is in no sense to be considered as the judgment of a court: *In re Stevens*, 83 Cal. 322; 17 Am. St. Rep. 252; *In re Johnson*, 98 Cal. 531. Still the rule above stated affirming the right of a party to show by extrinsic evidence the existence of the jurisdictional facts in support of the judgment, or other determination of a court or board of limited jurisdiction, is applicable in principle to the case as presented here, and fully justifies the action of the superior court in admitting the evidence referred to. The case of *Ex parte Clark*, 87 Cal. 638, does not sustain the contention of appellants upon this point. The statement in the opinion in that case, to the effect that it is necessary for the record to show that the adopting parent appeared before the proper judge, has reference to the record in the action in which the order of adoption may be offered in evidence, and not to the papers relating to the proceeding for adoption. The question of the admissibility of oral evidence, for the purpose of establishing material facts not shown by such papers, and not required to be recited therein, did not arise in that case, and was not passed upon by the court at that time.

But if the rule were otherwise, and it should be conceded that the court erred in admitting evidence as to the residence of the deceased, the error was harmless, as the petition for adoption states that the deceased and his wife were residents of the county of Sacramento, and having, upon the strength of that representation, obtained the order of the county judge of that county consenting to the adoption of respondent, the deceased would, in his lifetime, have been estopped to deny its truth in any controversy as to his parental duty to support and care for the child thus adopted by him, and the appellants who claim under him are equally estopped to deny the fact in this proceeding.

The appellants further claim that the order of adoption is void, first, because it was made upon the joint petition of the deceased and his wife, and purports to <sup>79</sup> order and direct that the respondent should thereafter be treated and regarded

as the child of both of them; second, because the parties to the contract of adoption were not separately examined; and, lastly, because the father of the respondent did not consent to the adoption, and was a nonresident of the state, and without notice of the proceeding.

There is no force in the first of the foregoing objections.

Section 221 of the Civil Code gives to any adult person the right to adopt the minor child of another, in the cases and under the rules prescribed by the chapter of which that section forms a part, and the following section, 223, provides that neither husband nor wife, unless lawfully separated, shall adopt a child without the consent of the other, if capable of giving such consent. Under these sections the wife has precisely the same right to adopt a child as the husband, and we know of no reason why both may not unite in an application for the adoption of a child as the child of both, or why in such a case the order of adoption should not declare that the child shall henceforth be treated and regarded as the child of both spouses. On the contrary, such procedure would seem to be in entire harmony with the object of the law, and an appropriate way by which husband and wife may mutually consent to the adoption of a stranger in blood into the family, and to assume toward such child the duties of the parental relation. The question of the right of husband and wife to jointly adopt a child arose in the state of Indiana under a statute similar to our own, and the supreme court of that state in *Krug v. Daris*, 87 Ind. 590, in answer to the objection that the statute did not contemplate or authorize such joint adoption, said: "On the contrary, the better and more reasonable construction appears to us to be that a wife may unite with her husband in such a proceeding as from the very nature of things the interests of the entire family are necessarily involved in the object sought to be accomplished by it. There is not only <sup>no</sup> no inconsistency, but a manifest propriety in the wife thus uniting with her husband, as by doing so the adopted child is made to assume, in a general sense, the same position in the family which it would occupy if it were the natural child of both, born in lawful wedlock." These views are so manifestly correct and applicable to the construction of our own law, as to render any further discussion of this point unnecessary.

Nor can the right of the respondent here to succeed to the estate of her parent by adoption be defeated by the fact that

the judge signing the order of adoption failed to separately examine the parties to it. It was expressly held by us in *In re Johnson*, 98 Cal. 531, that the examination of a child under the age of twelve years—the age of consent—was entirely discretionary with the judge, and we think the general reasoning of the opinion in that case in regard to the nature of the act of adoption in this state, and its statement of the rule by which to determine whether the provisions of a statute prescribing the mode of proceeding upon the part of a public officer in the discharge of a given duty, is mandatory or simply directory, lead to the conclusion that the examination of the other parties to the contract by the judge making the order is not absolutely necessary in order to effect the adoption of a minor; and, if this is so, it would necessarily result that section 227 of the Civil Code must be regarded as directory in so far as it requires that the parties shall be separately examined. In the case just referred to, in speaking of the nature of the act of adoption under our statute, we said: “The essential foundation of the proceeding is the consent of the persons named in the statute, and when this has been given in the presence of the proper judge, and manifested in writing, and by the order of such judge, the contract cannot be declared invalid because of some merely technical objection to the manner in which the judge who signed the order of adoption may have discharged his duty in the premises.” And it was further said by us at that time that the object of the statute in <sup>81</sup> directing the judge to make a separate examination of the parties, was for the protection of a wife, or child over the age of twelve years, whose consent is made essential to the creation of the contract, by guarding them in some degree from the possible coercive influence of the husband or parent, and also to enable the judge to ascertain whether the consent of such persons was entirely free. Undoubtedly, the judge ought, in the orderly and proper discharge of his duty, to conform to this direction of the law, but his omission to do so would not render the contract absolutely void. The deceased voluntarily entered into the contract of adoption under consideration here, and received in his lifetime the benefits resulting from the relation thus created—the society, affection, and devotion of an adopted daughter—and no principle of law or equity will permit the appellants claiming under him to avail themselves of this technical departure from the direction of the statute, to defeat the rights of respond-

ent growing out of the contract, the validity of which was never disputed by the deceased, and which has been fully performed by all the parties to it.

The remaining question to be considered is, whether the validity of the order of adoption is affected by the fact that it was made without the consent of the father of respondent and without notice to him. As already stated the father of respondent had been divorced from the mother on the ground of his adultery, and such being the case his consent to the order of adoption was rendered unnecessary by the express provisions of section 224 of the Civil Code then and now in force. The fact that the decree of divorce was made before the enactment of our Civil Code, and for an act of adultery committed in another state, did not make that section inapplicable to the proceeding taken by the deceased for the adoption of respondent, and to so hold is not to give any retroactive or extraterritorial effect to the provisions of that section. The section simply declares under what circumstances the consent of the natural <sup>82</sup> parent shall not be required in a proceeding for the adoption of a child, and it was intended to furnish the rule in regard to that matter in all subsequent applications for adoption under the statute. It is argued, however, by counsel for appellants that it is not in the power of the state to deprive a parent of the natural right to his child for such a cause, without at least affording him an opportunity to appear and answer the charge in the proceeding which is taken for the purpose of severing his parental relations. Whatever force there might be in this position in a case where the natural father of an adopted child was asserting his right to the custody of such child, or in an action brought by him to recover the value of its services from the adopted parent, it seems to us that the question thus argued by counsel does not arise here. The father of the respondent is dead; but, if he were alive, no rights of his would be impaired by giving force and effect to the contract of adoption, and permitting respondent to succeed to the estate of the deceased as the adopted child of the latter. The question here is simply whether the proceeding for the respondent's adoption entitles her to succeed to the estate of her adopted father, and we have no doubt that it does. The adoption was in accordance with the law of this state, and certainly, so far as relates to the right of inheritance under the laws of this state, it gave to the respondent the *status* of a child of the deceased. "It is a general principle

that the *status* or condition of a person, the relation in which he stands to another person, and by which he is ordinarily made capable to take certain rights in that other's property, is fixed by the law of the domicile, and that this *status* and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the *status* of those who claim succession or inheritance in his estate is to be ascertained by the law under which that *status* was acquired": *Ross v. Ross*, 129 Mass. 246; 37 Am. Rep. 321.

83 The conclusion we have reached in regard to the validity of the respondent's adoption by deceased also disposes of all questions arising upon the appeal from the order making partial distribution of his estate to Sophia G. Cutter. The distribution was made to her as a legatee under the will of the deceased. The will has been probated, and the respondent, Auzeais, does not question its validity, and the court, having found that she was the adopted and only child of the deceased, and, therefore, the only person having a right to object to distribution under its terms, properly held that the pendency of the proceeding instituted by appellants for the purpose of revoking the probate of such will would not defeat the rights of the legatees named therein. The respondent, Auzeais, being the only heir of the deceased, the appellants have no right which can be affected by any disposition which may be made of the estate of deceased.

Orders affirmed.

FITZGERALD, J., and McFARLAND, J., concurred.

Hearing in Bank denied.

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ADOPTION.—The various questions concerning adoption discussed in the principal case will be found fully treated in *Van Matre v. Sankey*, 148 Ill. 536; 39 Am. St. Rep. 196, and the monographic note thereto



## WITTENBROCK v. PARKER.

[102 CALIFORNIA, 98.]

**ATTORNEY AND CLIENT—RELATIONSHIP OF, BETWEEN WHOM EXISTS.**—The fact that he who selects an attorney to make an examination of title for the purpose of a contemplated loan requires the borrower to furnish an abstract of title and to pay the attorney for his services does not constitute him the attorney of the borrower, nor make him any the less the attorney of the lender by whom he was selected.

**NOTICE TO ATTORNEY, WHEN DEEMED NOTICE TO HIS CLIENT.**—It is the duty of an attorney at law or other agent to communicate to his client whatever information he acquires in relation to the subject matter involved in the transaction; and he will be conclusively presumed to have performed this duty, and notice to him is therefore conclusive notice to his client or principal.

**NOTICE TO AN AGENT IS NOT NOTICE TO HIS PRINCIPAL UNLESS** given to the agent acting in the course of his employment, or unless, though not so given, it is present to his mind when acting as such agent, and is of such a character that he might communicate it to his principal without a breach of professional confidence.

**NOTICE TO ATTORNEY, WHEN NOT NOTICE TO CLIENT.**—If one member of a firm of attorneys, by mistake in drafting an intended partial release of a mortgage, releases the whole, and such release is placed upon record, and at a subsequent time another loan is negotiated, and the borrower employs the same firm to examine the title for him, and it is examined by another member of the firm who had no knowledge of the previous transaction and no information respecting the title except such as is disclosed by the abstract, the borrower is not charged with notice of the mistake made by the other member of the firm, nor of the fact that a partial release only of the mortgage was intended.

**NEGLECT, WHO SHOULD SUFFER FOR.**—Where one of two innocent parties must suffer from negligence the loss should be borne by him through whose negligence the mishap was brought about.

**NOTICE, WHEN MUST BE PROVED.**—If a mortgage was given upon real property and duly placed upon record at the time when the title appeared by the record to be free from all other liens, and a suit is afterwards brought to foreclose the mortgage, which was satisfied of record, on the ground that such satisfaction was entered by mistake, the plaintiff must assume the burden of proving that the mortgagee of the second mortgage took it with notice that the prior mortgage had not in fact been satisfied.

*P. H. Coffman, Armstrong and Platnauer, and Armstrong, Bruner, and Platnauer, for the appellant.*

*C. H. Oatman, A. L. Hart, and S. Solon Holl, Robert T. Devlin, and Isaac Joseph, for the respondents.*

<sup>96</sup> SEARLS, C. This was an action by Henry Wittenbrock, as plaintiff, to have a satisfaction of a mortgage <sup>97</sup> set aside and canceled, and to foreclose said mortgage, which was executed by the defendant, John A. Parker. Defendants Bithell

and Harlow were made defendants, set up mortgages in their favor, which, by the decree of the court, were adjudged valid and subsisting against the defendant Parker, and the liens thereof prior to the lien of plaintiff's mortgage.

Plaintiff appeals from the decree, and from an order denying a motion for a new trial.

The following facts illustrate the important question in the case: Plaintiff's mortgage was executed May 22, 1885, by the defendant John A. Parker, upon certain real property in the county of Tehama, to secure the payment of his certain promissory note for six thousand dollars and interest, payable two years after date to the Union Building and Loan Association, or order. The mortgage was duly recorded May 23, 1885.

L. S. Taylor and S. Solon Holl were attorneys at law and copartners under the firm name of "Taylor and Holl," and engaged as such firm in the practice of law in all its various branches, including the examination of land titles, giving opinions as to the validity thereof, drawing deeds, mortgages, assignments, and other instruments in writing.

In February, 1888, the note of Parker was due and unpaid, and the Union Building and Loan Association was pressing him for payment, whereupon L. S. Taylor, the senior member of the firm of Taylor and Holl, at the request of Parker, negotiated with plaintiff for the purchase by him of said note and mortgage, and to grant further time for the payment thereof. To this plaintiff agreed, and in February, 1888, the holder of the note and mortgage, in consideration of seven thousand dollars, which plaintiff paid, assigned to him, the said plaintiff, the note and mortgage. This assignment was drawn by Taylor, and, at his request, recorded March 5, 1888. Holl knew nothing of the assignment.

On or about October 4, 1888, John A. Parker, the maker of the note and mortgage, had contracted to sell <sup>ss</sup> a portion of the mortgaged premises, and applied to plaintiff through said Taylor for a release of the lien of his mortgage upon the land to be sold upon his payment of four thousand dollars upon the note, the mortgage to remain upon the residue of the land as security for the balance due on the note.

Plaintiff agreed to this, and said L. S. Taylor then prepared a release, which he represented to plaintiff and Parker was a release of the land to be sold, and plaintiff, believing this to be true, executed and acknowledged the release, but

which in fact was, as the court finds, by mistake and inadvertence, so drawn as to read "that said mortgage was fully paid and satisfied."

Plaintiff did not himself read the release, but took the statement of Taylor that it was all right.

This release came into the hands of W. F. Huntoon, at whose request it was duly recorded on the twenty-second day of October, 1888.

The copartnership between Taylor and Holl was formed January 1, 1885, prior to which time Taylor had been an attorney for plaintiff and defendant Parker, his services consisting mainly in preparing deeds, mortgages, assignments, and releases, and examining abstracts. That after the formation of said copartnership plaintiff and Parker continued to employ his services in like manner, and his partner, Holl, who occupied a separate office, or room, knew little or nothing of their business, and knew nothing of the mortgage in question, its assignment, or the release thereof, or of any of the agreements relating thereto, nothing in relation thereto having been in fact imparted to him.

For some years prior to 1888 defendant Bithell was accustomed to loan money on real estate security, and was accustomed to require the borrower to furnish an abstract of title to the land offered as security, and to submit such abstract to an attorney selected by him, the said defendant, and to pay said attorney for his opinion as to title, and for preparing mortgages, etc., where the loans were consummated.

•• Bithell had for some years selected S. Solon Holl as the attorney to examine and report upon titles in all such cases, and to prepare all necessary papers, to which said Holl gave his individual attention.

On the twenty-fourth day of October, 1888, defendant John A. Parker applied to defendant Bithell for a loan of six thousand dollars, and offered real estate as security therefor. Bithell applied to Holl to examine the abstract of title of the real estate offered, and to prepare notes and mortgages if he approved the title. The title was approved by Holl, and the notes and mortgages prepared and executed by Parker on the same day, and the money, six thousand dollars, was then and there received by said Parker.

The mortgages, four in number, covered the property mortgaged to plaintiff. Neither Bithell nor Holl knew of the plaintiff's mortgage or the assignment or release thereof except

as shown by the abstract, and had no actual notice or knowledge of any mistake in the release. The record showed plaintiff's mortgage to have been released. Holl advised Bithell that the land was clear of encumbrance, and Bithell relied upon and acted upon this belief in making his loan, and neither he nor Holl had, in fact, any information as to the mistake in plaintiff's release until January, 1891.

Upon this state of facts the question arises, Had Bithell such constructive notice of the mistake in the release of the mortgage of plaintiff that the lien of his own mortgages upon the same land was postponed and rendered subject and subordinate to that of plaintiff under his mortgage so by mistake released?

Taylor and Holl, being engaged as copartners in the practice of the law, including business of the character transacted for the several parties to this controversy, the knowledge acquired by one member of the firm, obtained while transacting such business and relating thereto, was constructive notice to the firm as to such knowledge.

An attorney is an agent for his client within the <sup>100</sup> scope of his employment, and two or more attorneys practicing together as copartners are joint agents as to the business transacted for their clients as such copartners.

Notice to one of two or more joint agents is notice to all: Wade on Law of Notice, sec. 681; *Fulton Bank v. New York etc. Canal Co.*, 4 Paige, 127; *North River Bank v. Aymar*, 3 Hill, 262; *Bank of United States v. Davis*, 2 Hill, 451; *National Security Bank v. Cushman*, 121 Mass. 490. Like other copartners, each is at the same time a principal and an agent for all the others.

2. The important branch of the question relates to the situation of the defendant Bithell, as affected by the knowledge imputed to Holl, who was his attorney and agent in passing upon the abstract of title to the land, and in preparing the mortgages.

We say he was the attorney and agent of Bithell in the transaction, because he was employed by him, and it was to and for him the services were rendered, and the fact that his employer required the mortgagor to furnish an abstract and pay Holl for his services did not constitute him the attorney of the latter.

The burden cast upon the mortgagor of paying for the services of the attorney selected by Bithell to guard his

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to his client or principal: *Bierce v. Red Bluff etc. Co.*, 31 Cal. 161; *The Distilled Spirits*, 11 Wall. 356; *Watson v. Sutro*, 86 Cal. 500.

The facts constituting knowledge, or want of it, on the part of the agent are proper subjects of proof, and are to be ascertained by testimony as in other cases, but, when ascertained, the constructive notice thereof to the principal is conclusive, and cannot be rebutted by showing <sup>102</sup> that the agent did not in fact impart the information so required: *Watson v. Sutro*, 86 Cal. 500.

In the present case it does not appear that Holl, who acted as the attorney of Bithell, acquired any knowledge in relation to plaintiff's mortgage or the mistake in its satisfaction during the time he was engaged in effecting the Bithell loan. Whatever notice he had of the mistake in its satisfaction plaintiff's mortgage, if any, was constructive and previously obtained.

There is abundant authority to the point that notice to an agent to be notice to his principal must be given to him while acting in the course of his employment: *Weisser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 781; *Doe ex dem. Reynolds v. Ingersoll*, 11 Smedes & M. 249; 49 Am. Dec. 57; *Russell v. Swezey*, 22 Mich. 235; *Smith v. Dunton*, 42 Iowa, 48; *Goodwin v. Dean*, 50 Conn. 517; *Pringle v. Dunn*, 87 Wis. 449; 19 Am. Rep. 772.

Lord Hardwick, in discussing this rule, remarked that a different rule "would make purchasers and mortgagees' titles depend altogether on the memory of their counselors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions."

In *Trentor v. Pothen*, 46 Minn. 298, 24 Am. St. Rep. 225, Mitchell, J., in referring to the question, expresses like views in the following language: "If a party who employs an attorney for the special purpose of examining an abstract and passing upon the record title is to be charged with notice of all knowledge which the attorney may have previously acquired from other transactions for other parties, it would be very dangerous to employ an attorney at all for any such purpose, and the one whom it would be most dangerous to employ would be the attorney having the most experience and the most extensive practice."

The authorities in this state have, so far as observed, con-

defined the limits of constructive notice to the bounds hereinbefore stated.

It must be admitted, however, that the rule has, in <sup>103</sup> many instances, and by eminent jurists, been extended so as to deem the principal to have constructive notice of information acquired by the agent prior to, and independent of, the scope of the agency.

A synopsis of the rule as thus indicated, taken from the syllabi of *The Distilled Spirits*, 11 Wall. 356, indicates fairly well the result of the reasoning of the court in that case:

“The rule that notice to the agent is notice to the principal applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence.”

Pomeroy's Equity Jurisprudence, section 672, states the general rule to be limited by cases in which the transaction in question closely follows and is intimately connected with a prior transaction in which the agent was also engaged, and in which he acquired material information, or where the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory in the second transaction, then such information operates as constructive notice to the principal in such second transaction.

The same author adds that “while this particular rule is settled by a strong array of authorities, the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits.”

It seems conceded on all hands that clear and satisfactory proof that the knowledge of the former transaction was present in the mind and memory of the agent at the time of the second transaction is necessary, in order to bind the principal in such second transaction by constructive notice of the prior information of the agent.

Conceding, then, this enlargement of the rule of notice, which, in a few cases, may prove a salutary one, <sup>104</sup> but which needs to be closely guarded to prevent injustice from the difficulty and uncertainty which must attend its application, and it is not perceived how appellant's case is strengthened.



The constructive notice to a principal comes from information, knowledge, possessed by his agent.

Holl, as the attorney and agent of Bithell, had no knowledge or information to put him upon inquiry as to the prior mortgage of plaintiff, its assignment, or the mistake in its satisfaction. His only information was that furnished by the abstract and satisfaction, all of which showed the property clear of encumbrance. Constructive notice to the principal springs from actual knowledge or such information as should awaken inquiry in a reasonable man, imparted to or acquired by the agent.

The reason of the rule is that the agent has acquired knowledge which it was his duty to impart to his principal, and the presumption is that he has performed that duty. The knowledge of the agent is a prerequisite to the presumption, and where the former fails the latter has no application.

The knowledge which Taylor possessed that plaintiff's mortgage was not to be satisfied in full, and which constructively bound his law partner, Holl, applied to their then principal, the plaintiff, and to their liabilities to each other.

When Holl came to act in another capacity for a new principal, and in a different matter, the notice to him which constructively bound such new principal was actual notice, founded upon knowledge or information which it was in his power to impart, the facts constituting which it was necessary to prove, and which, when proven, would raise an irrebuttable or conclusive presumption against such principal.

The evidence and findings show that the mistake in the satisfaction of plaintiff's mortgage was a separate and distinct transaction, and that so far from being in the mind of the attorney Holl, at the date of the execution <sup>105</sup> of the Bithell mortgage, he had not previously been aware of any fact in the matter, and did not become aware of the mistake in satisfying plaintiff's mortgage for many months thereafter.

The case presented is this: Plaintiff and Bithell are both innocent parties. Plaintiff had a prior mortgage which he by mistake satisfied in full without reading the satisfaction. This was negligence on his part, and, as one of two innocent parties must suffer as a consequence of such negligence, it is equitable and just that the loss should fall upon the plaintiff by whose negligence the mishap was brought about: *Schultz v. McLean*, 93 Cal. 356; *Somes v. Brewer*, 2 Pick. 201; 13

Am. Dec. 406; *Mundorff v. Wickersham*, 63 Pa. St. 87; 3 Am. Rep. 531; Civ. Code, sec. 3543.

The argument of appellant directed to the allegations of the pleadings and the issues formed thereby does not call for special notice, for the reason that so far as any doubt is left as to the matters discussed it is upon questions not going to the merits of the case.

The several objections made to the introduction of evidence, and the errors assigned upon the rulings relating thereto, do not require special notice, beyond the remark that as between plaintiff and Bithell they involved no error, and as between them the judgment and order appealed from should be affirmed.

G. W. Harlow, administrator with the will annexed of the estate of David Fuhrman, deceased, was made a party defendant, who it was alleged claimed "some estate or interest in said mortgaged land, but that said estate or interest therein is subsequent to said mortgage lien (of plaintiff) thereon and should be postponed thereto," etc.

Harlow answered denying that his estate or interest in certain of the mortgaged land which he described as subsequent to the alleged mortgaged lien of plaintiff, but alleged that plaintiff's mortgage lien was inferior and subject to the mortgage lien of defendant thereafter set forth.

<sup>106</sup> Defendant then proceeds, as it is expressed, in "further answering said amended complaint," to set out in an orderly and usual manner as in a complaint or cross-complaint, and to aver that on the twenty-third day of January, 1889, the defendant Parker made to David Fuhrman his promissory note for two thousand dollars, payable one year after date, with interest at ten per cent per annum; the execution of a mortgage to secure the payment thereof, upon certain described land, being upon a part of the land described in plaintiff's mortgage; the due recording of the mortgage on the twenty-fourth day of January, 1889; that the note is due and unpaid; the death of Fuhrman, February 22, 1889; probate of his will; appointment of Harlow as administrator with the will annexed; that he duly qualified, etc.; that plaintiff and certain other named parties claim some interest in the premises or some part thereof, as purchasers, mortgagees, or otherwise, all of which interests and claims, except that of the defendant Bithell, are subsequent to the lien of defendant's mortgage.

The prayer is in the usual form for foreclosure of the mortgage, sale of the property, etc.

In other words, although denominated an answer, it is in fact a cross-complaint. The court, in its findings and decree designates it as a cross-complaint, and such in point of law it was and is.

So treating it the court found as follows:

"I find all the allegations of the defendant Harlow's cross-complaint true."

There is in the complaint no allusion to the mortgage of Fuhrman or to Harlow, except that as administrator, etc., he, in common with others, claimed some interest in the mortgaged premises, which was averred to be subsequent and subject to the lien of the plaintiff's mortgage, and should be foreclosed.

Harlow denied that the lien of plaintiff's mortgage was prior to his, as above set forth. This was all there was in the complaint for him to deny. Having set out the mortgage of his testator, and asked for its foreclosure, <sup>107</sup> he was entitled to make proof, as was done, of its due execution, etc. There was neither allegation nor proof that he had notice of plaintiff's mortgage. When Harlow's mortgage was recorded it was constructive notice to the world; and as against the prior mortgage of plaintiff, which had, before that time, been discharged of record, it is, in the absence of proof of actual notice, to be deemed prior in lien.

If there was actual notice of plaintiff's mortgage imparted to Harlow it was an affirmative matter, the proof of which devolved upon plaintiff; failing in which, he cannot complain.

The judgment and order appealed from should be affirmed.

HAYNES, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

McFARLAND, J., FITZGERALD, J., DE HAVEN, J.

Hearing in Bank denied.

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ATTORNEY AND CLIENT—NOTICE TO ATTORNEY, WHEN NOTICE TO CLIENT. Notice to an agent or attorney is notice to a principal when it comes to an agent or attorney in such a manner that he may communicate it to his principal, or act upon it without any violation of duty: *Littauer v. Houck*, 92 Mich. 162; 31 Am. St. Rep. 572, and note. See extended note to *Trentor v. Potken*, 24 Am. St. Rep. 232.

**AGENCY—NOTICE TO AGENT, WHEN NOTICE TO PRINCIPAL.**—Notice acquired by an agent while transacting the business of his principal is notice to the latter: *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; 35 Am. St. Rep. 770, and note, with the cases collected.

**EQUITY—WHICH ONE OF TWO INNOCENT PARTIES MUST SUFFER.**—When one of two innocent persons must suffer, he whose neglect has caused the loss must suffer: *Ridgway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 586; *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578; *Beach v. Schoff*, 28 Pa. St. 195; 70 Am. Dec. 122, and note; *Maple v. Kussart*, 53 Pa. St. 349; 91 Am. Dec. 214; *Caldwell v. Neil*, 21 La. Ann. 342; 99 Am. Dec. 738, and note; *Maynard v. Fireman's etc. Ins. Co.*, 34 Cal. 48; 91 Am. Dec. 672; *Sprights v. Hawley*, 30 N. Y. 441; 100 Am. Dec. 452. But see the cases of *King v. Sparks*, 77 Ga. 285; 4 Am. St. Rep. 85, and *Fordyce v. Kosminski*, 49 Ark. 40; 4 Am. St. Rep. 18.

## EX PARTE FOSS.

[102 CALIFORNIA, 347.]

**EXTRADITION—SURRENDER OF FUGITIVE BY NATION NOT REQUIRED TO DO SO BY TREATY.**—If a fugitive from justice is surrendered by a foreign nation having an extradition treaty with the United States agreeing to surrender fugitives accused of certain crimes of which that charged is not one, such person is not, on being brought into this state, entitled to be released from custody because the crime was not one included in the terms of the treaty. The existence of the treaty did not deprive the foreign nation of power to surrender fugitives from justice accused of crimes not named therein nor the United States of the right to receive such fugitive into its custody.

**EXTRADITION—PROSECUTION ON OTHER CHARGES.**—If a fugitive from justice is surrendered by a foreign nation and brought to this state, and thereafter the indictment against him is set aside, this is not equivalent to his acquittal, and he may be prosecuted upon another accusation of the same crime.

*C. E. McLaughlin and W. W. Kellogg*, for the petitioner.

*W. S. Webb*, for the state.

249 DE HAVEN, J. The petitioner, Foss, was indicted by the grand jury of the county of Plumas for the crime of embezzlement. At the date of the finding of this indictment the petitioner was in Honolulu, and there remained until February, 1894, when, upon the request of the American minister, and upon "a requisition to that effect" from the governor of the state of California, he was surrendered by the provisional government of the Hawaiian Islands to the agent appointed by the governor to receive and convey him back to this state, there to be tried for the offense with which he was charged in the indictment referred to.

The treaty between the United States and the government of the Hawaiian Islands in relation to the extradition <sup>350</sup> of fugitives from the justice of either of such countries does not provide for the extradition of a person charged with the crime of embezzlement, and the warrant issued by the Hawaiian government for the arrest of the petitioner, and for his delivery to the agent appointed by the governor of this state to receive him into custody, does not refer to the treaty, but the proceedings preliminary to the issuance of such warrant were conducted in accordance with the rules prescribed by the treaty to effect the extradition of a person charged with either of the offenses for which extradition is there provided. The petitioner, upon his return to this state, was brought before the superior court of Plumas county, in which the said indictment against him was pending, and he then moved to set the indictment aside. The motion was granted, and he was discharged from custody, and within two hours thereafter a complaint was filed with a justice of the peace, charging him with the same embezzlement named in the indictment previously set aside, and he was again arrested, and after examination held to answer the charge before the superior court of Plumas county; and he is now in the custody of the sheriff of that county awaiting his trial.

The petitioner claims that his imprisonment, under the circumstances here stated, is illegal, and he seeks to be discharged therefrom under the writ of *habeas corpus* upon which he has been brought before this court.

In support of this general contention he insists that his arrest in the foreign country and enforced return to this state, and detention here for the purpose of being tried for the crime charged in the indictment, was, and is, in violation of his rights under the treaty between the United States and the government of the Hawaiian Islands. That treaty, in article 14, provides: "The contracting parties mutually agree to surrender, upon official requisition, to the authorities of each, all persons who, being charged with the crimes of murder, piracy, arson, robbery, forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall be <sup>351</sup> found within the territories of the other, provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial, if the crime had there been committed":

9 U. S. Stat. at Large, 981. It is argued that the treaty, in thus enumerating the offenses for which fugitives who have sought an asylum in either country shall be delivered into the custody of the other upon demand of its government, in effect prohibits the surrender by either nation of a person charged with any other than one of the mentioned crimes; that the treaty is to be construed as containing an implied stipulation upon the part of the United States that a person committing any other crime against its laws than one of those named in the treaty, and who thereafter escapes to Hawaii, shall not be subject to arrest and return to the United States, there to be tried for such nonenumerated crime, even though the government of Hawaii should voluntarily surrender him for that purpose as a matter of comity. In our opinion the language of this treaty will not bear such a construction. It is, of course, true that, when a treaty provides for the extradition of fugitives charged with particular crimes, the reciprocal duty of delivering up to the justice of the other persons charged with crime is confined to the particular cases for which the treaty has provided: *Commonwealth v. Hawes*, 13 Bush, 697; 26 Am. Rep. 242; *United States v. Rauscher*, 119 U. S. 407, 411, 412. Thus, in *Commonwealth v. Hawes*, just cited, it is said: "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express and implied, of the treaty."

But while this is so, the existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise <sup>362</sup> its own discretion in cases not coming within the terms of the treaty. It is only to the extent that the treaty imposes an obligation to surrender persons charged with particular offenses that there is any restriction placed upon the sovereign right of the nation in which the fugitive is found, to either permit, or refuse to permit, his arrest and return to the country from which he has fled. In other words, in relation to persons charged with offenses not named in the treaty, each government, as an incident of its sovereignty, may either grant or deny to the fugitive an asylum within its jurisdiction. This conclusion is so obviously correct that no extended argument is necessary to sustain it, and the principle is thus stated in section 269 of

volume 2 of Wharton's International Law Digest: "The rule *expressio unius est exclusio alterius* applies to extradition treaties; and under such treaties process can be sustained only for enumerated offenses. This, however, would not preclude in extraordinary cases, and an appeal, not on the basis of the treaty, but on the ground of comity, for surrender of a fugitive charged with a nonenumerated offense, when such offense is one which would justify such an extraordinary measure. . . . Thus, in 1796, the secretary of state (Mr. Pickering), 'expresses his concurrence with Mr. Liston (British minister at Washington), in the opinion that while the reciprocal delivery of murderers and forgers is expressly stipulated in the 27th article of our treaty with Great Britain, the two governments are left at liberty to deliver other offenders as propriety and mutual advantage shall direct. . . . The attorney general has just called, and thinks the opinion expressed to be correct': Mr. Pickering to the president, June 3, 1796. MSS. Dom. Let. In a letter of same date to the governor of Vermont, Mr. Pickering says: 'The reciprocal delivery of murderers and forgers is positively stipulated by the 27th article of the treaty; the conduct of the two governments with respect to other offenders is left, as before the treaty, to their mutual discretion, but this discretion will doubtless advise <sup>333</sup> the delivery of culprits for offenses which affect the great interests of society.'"

The crime with which the petitioner is charged, not being an extraditable offense under the treaty between the United States and the government of the Hawaiian Islands, it must be presumed that the surrender of the petitioner was made by the latter in the exercise of its own sovereign discretion and as an act of comity. This violated no right secured to the petitioner by the treaty referred to, as that treaty does not in terms, or by necessary implication, deny to that government the right to surrender, or deprive the United States of the right upon such surrender to receive into its custody, fugitives charged with offenses not enumerated in the treaty. The cases of *United States v. Rauscher*, 119 U. S. 407; *Commonwealth v. Hawes*, 13 Bush, 697; 26 Am. Rep. 242; *United States v. Watts*, 8 Saw. 370; *Ex parte Hibbs*, 26 Fed. Rep. 421, cited and relied upon by petitioner, do not sustain his contention upon this point. Those cases simply declare that when a defendant has been surrendered in pursuance of a



treaty for trial upon a specific charge named therein he cannot be placed upon trial for any other than the particular offense named in the extradition proceeding. This rule is well settled, but it has no application whatever to the case presented by the petitioner here.

It is also contended in behalf of petitioner that he was only surrendered by the government of the Hawaiian Islands for trial upon the indictment referred to in the warrant issued by the government commanding his arrest and delivery into the custody of the agent authorized to convey him back to this state, and that when this indictment was set aside he had fully met his accusation and was entitled to a reasonable time within which to return to the foreign asylum, and that he cannot be lawfully detained here to answer the complaint upon which he is now held for trial before the superior court. If it should be conceded that a fugitive from justice, surrendered by a foreign government on grounds <sup>354</sup> of comity, has the same right to his discharge upon *habeas corpus*, when imprisoned upon a different charge than that for which he was delivered up, as if he had been extradited under the provisions of a treaty, and arrested and detained for trial upon another offense than that named in the extradition proceedings, in violation of the implied provisions of the treaty, still we do not think the petitioner here would be entitled to a discharge upon the facts appearing in this record. The order setting aside the indictment did not operate as an acquittal of the petitioner for the offense therein charged, and is not a bar to his further prosecution for the same offense by indictment or information. And as he is now held by virtue of an order of commitment based upon a complaint charging him with the identical offense named in the indictment set aside, and to answer which he was surrendered by the Hawaiian government for trial by the state, the petitioner should be remanded.

Petitioner remanded.

BEATTY, C. J., HARRISON, J., and GAROUTTE, J., concurred.

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McFARLAND, justice, dissented, saying: "The first point made by the petitioner is that he cannot be returned to this country and tried here for any crime not enumerated in the treaty. There are certain very strong authorities to sustain this point, particularly *Commonwealth v. Hawes*, 13 Bush, 697; 26 Am. Rep. 242; *United States v. Watts*, 8 Saw. 370; *Holmes v. Jennison*, 14 Pet. 540, 593; *United States v. Rauscher*, 119 U. S. 407; Spear on

Extraditions, 221, 205, et seq. The questions raised by this point need not, however, be here passed upon definitely, because we think that the petitioner should be discharged upon the second point made by his counsel, to wit, that the indictment upon which the extradition was secured having been set aside, and the petitioner entirely discharged, he cannot afterwards be held upon the complaint before a justice of the peace, without having been given reasonable time to return to the country from whence he was brought. The treaty above mentioned provides that a person charged with crime shall be extradited only 'upon such evidence of criminality as, according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the crime had been committed there. It further provides that the person demanded shall be brought before a court of the country in which he is 'to the end that the evidence of criminality may be heard and considered.' And if, upon such hearing, the magistrate is satisfied that the evidence sustains the charge, he may issue a warrant for the surrender of the fugitive. Now, in the case at bar, it appears that the judge at the Hawaiian Islands was presented with a certified copy of the indictment that had been found against the petitioner, with the affidavit of the foreman of the grand jury, and that he acted entirely upon the sufficiency of the evidence as afforded by said indictment. And the indictment upon which the authorities of the Hawaiian Islands acted, and which it may reasonably be supposed was considered as sufficient evidence for action there, having been set aside and held invalid by the court in Plumas county, and the prisoner having been discharged under said indictment, upon which the extradition papers were based, he could not be held upon a complaint before a magistrate and proceedings which were entirely unknown to the authorities of the Hawaiian Islands, and upon which their order for the arrest of the fugitive was not in any way based. As was said in *Commonwealth v. Hawes*, 13 Bush, 697, 26 Am. Rep. 242: 'By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language. It would scarcely be regarded an abuse of the rules of construction from these manifest restrictions unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than one upon which he is surrendered, much less against one for which his extradition could not be demanded.' And I think the right under the treaty is one which the petitioner himself may assert. The petitioner, in my opinion, should be discharged from custody."

**EXTRADITION—RIGHT OF FOREIGN NATION TO SURRENDER FUGITIVE.**—A sovereign state has the right to surrender to a friendly nation an offender against the laws of the latter, whatever may be the difference of opinion in regard to its obligation so to do: *Matter of Fetter*, 23 N. J. L. 311; 57 Am. Dec. 382. By the law and usages of nations fugitives charged with felonies or other high crimes should be surrendered by a foreign and friendly nation to which they have fled: *In re Washburn*, 4 Johns Ch. 106; 8 Am. Dec. 548, and note.

**EXTRADITION.**—An extradited fugitive is triable for a crime other than that named in the warrant, when the criminal act for which he was extradited and that for which he is indicted and held is the same: *People v. Cross*, 135 N. Y. 536; 31 Am. St. Rep. 850, and note; but see *Commonwealth v. Wright*, 153 Mass. 149; 25 Am. St. Rep. 475, and note.

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## BLUM v. WESTON.

[102 CALIFORNIA, 302.]

**WAYS OF NECESSITY—PARTITION.**—On the partition by judgment of a tract of land, if one of the parcels set aside to be held in severalty is so situated that a way of necessity would be implied in its favor had it been conveyed by all the tenants in common to one of their number, the same implication arises in favor of the person to whom it was set aside by such judgment and his successor in interest, whether the way was referred to in the judgment or not.

**WAY OF NECESSITY.**—THE RIGHT OF A WAY OF NECESSITY PASSES with each successive transfer of the title, whether voluntary or involuntary.

**WAY OF NECESSITY, LACHES IN CLAIMING.**—A way having been created by necessity for its use cannot be extinguished so long as the necessity continues to exist, and therefore continues though not claimed for many years during which another right of way was used under a special agreement.

**A RIGHT OF WAY OF NECESSITY** cannot be denied on the ground that such a way could be procured by condemnation under the statute.

**WAY OF NECESSITY.**—It is no answer to the existence of a way of necessity that the persons over whose land it is claimed should have designated its locality, as, if they did not, the owners of the dominant estate could designate it.

*R. M. Fitzgerald*, for the appellants.

*R. H. Latimer and C. Y. Brown*, for the respondents.

304 HAYNES, C. Respondents are the owners of a certain parcel of land in Contra Costa county, which is bounded on the west by a county road, and on the east by lands of appellant Weston, and this action is brought against Weston and his tenant, White, to recover damages for alleged trespasses committed by crossing respondents' land to the county road. The defendants (appellants here) in defense of the action alleged a way of necessity across plaintiffs' land to reach the county road, and that in the use and enjoyment of said easement which is appurtenant to their land they traveled across plaintiffs' land over a roadway designated for such use by plaintiff, Simon Blum.

Defendant Weston also filed a cross-complaint seeking to quiet his title to said easement. Demurrers were interposed

to the answers and cross-complaint, which were overruled, and no question is made here as to the sufficiency of these pleadings. The cause was tried by the court without a jury, and resulted in findings and judgment <sup>365</sup> for plaintiffs, from which the defendants appeal upon the judgment-roll.

The findings of fact are very full, and specify with great particularity the whole course of the title of both parcels from the patent granted by the United States down to the parties to this action. Briefly stated, the facts found are as follows:

In 1866 the United States patented the San Miguel rancho to thirteen persons as tenants in common, both parcels here involved being part of said rancho. These patentees sold their interests to divers persons, and in 1868 about fifty persons owned the rancho as tenants in common; and in that year the ranch was partitioned among the owners by the district court, the hill land and valley land being separately divided. S. Blum, one of the plaintiffs, received an undivided two-thirds interest in lot 8 of "hill land," and the same interest in lot 8 of the "valley land," and M. S. Chase, defendants' remote grantor, received an undivided one-third in each of said lots. The title to Blum's interest in lot 8, hill land, by mesne conveyances, became vested in W. E. Davis, and Chase having died, the lot last mentioned was, in 1876, partitioned by the court between Swain, his administrator, and Davis, part A, containing 425 acres, being awarded to Davis, and part B, containing 213 acres, to Swain, as administrator. Part B, so partitioned to Chase's administrator, through several mesne conveyances, became vested in one C. K. Breeze, and in 1889 was sold under execution to satisfy a judgment against Breeze, and the purchaser at execution sale sold and conveyed the same parcel to defendant Weston in July, 1890.

In 1871 lot 8, valley land, was also partitioned by the court between Chase's administrator and the plaintiffs in this action, the lot being divided into two parts, designated as divisions 1 and 2, division 1 being allotted to plaintiffs, and being the same parcel described in the complaint in this action.

<sup>366</sup> Some other findings were made which will be noticed hereafter.

So far as the situation of defendant's land is concerned, no question is made but he is entitled to a way of necessity. For a general discussion of this class of easements, and a

statement of the law as to several of the elements thereof, see *Kripp v. Curtis*, 71 Cal. 62.

The substance of respondents' contention is that "a way of necessity" lies in grant, though it is not necessary that it be an express grant; that "the deed of a grantor creates the way when it is one of necessity as much as it does when it is created by an express grant"; but that here there was no grant, the original tract, which embraced both parcels, being owned by many persons as tenants in common, and that the several ownership of the different parcels was accomplished by proceedings under the statute for partition, and that no grant can be implied in such case.

But this contention cannot be sustained either upon principle or authority. I can perceive no difference in the effect of an allotment by order of the court in a proceeding for partition and an allotment by deed from all the other tenants in common. The effect in each case is to vest the title of all in a particular parcel in one, the decree operating as such conveyance. In *Viall v. Carpenter*, 14 Gray, 127, it was said: "The court do not doubt that, by the division of the real estate of Thomas Carpenter, deceased, in the probate court, his heirs, to whom specific portions of that estate were assigned, acquired a right of way to those portions over other lands which had been their ancestor's. And whether they acquired this right solely as of necessity, without any provision therefor in the language of the division, or by the effect of the language used by the committee in making the record of the division, seems to us unimportant. . . . The reservation, in terms, of a way of necessity, would confer no further right than would be conferred by operation of law, without those words."

In *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421, a part of the land belonging <sup>357</sup> to an estate fronting on a highway was set off to the widow, and the remainder was sold by order of court. It was held that the purchaser had a way of necessity over the widow's land. The court, in that case, went so far as to say that: "A right of way, upon a severance of the estate by partition between heirs, sometimes arises when it would not exist in case of a conveyance of one portion of the premises."

In *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43, it was held that where a judgment creditor levied on part of the debtor's land, leaving the latter no passage from the remaining por-

tion to the highway, the debtor has necessarily a right of way over the land levied upon: See, also, *Taylor v. Townsend*, 8 Mass. 411; 5 Am. Dec. 107; *Smyles v. Hastings*, 22 N. Y. 217.

It does not affect Weston's right that he was not a party to the partition. The easement, resulting by operation of law from the fact that the parcel of land he now owns was cut off from the county road by other subdivisions of the original tract, attached to that parcel as an appurtenance, and passed with each successive transfer of title, whether such transfer was by deed executed by the party, or by sale under execution. That it is such appurtenance, and passes to each successive owner, was held in *Taylor v. Warnaky*, 55 Cal. 350. The Civil Code makes no distinction as to the mode of transfer, but provides generally that "a transfer of real property passes all easements attached thereto": Civ. Code, sec. 1104.

Respondents also cite several cases to the effect that partition suits do not create new or additional titles in the respective parties, that it only severs the unity of possession. But those cases did not involve the question of an easement appurtenant to the land allotted to each, but related to the title by which the tenants in common held the land itself. It is further argued that no grant from Chase could convey any title as against Blum, his cotenant. If by this is meant that Chase could not grant a right of way, other than a way of ~~see~~ necessity, across land in which Blum was a cotenant, the statement is correct; but Chase and Blum, as cotenants of lot 8, hill land, had a right of way of necessity over lot 8, valley land, which was also owned by them; and when lot 8, hill land, was again partitioned the way was not lost, because Chase and Blum still owned the valley land as cotenants; or, if the valley land were first partitioned, such partition could not destroy the easement which belonged to the hill land.

It is further argued that the judgment in these partition suits did not provide a right of way for the hill land, and that these judgments are final. But we have seen that it is not material whether in these judgments a way was reserved or not; that the law itself creates it: *Viall v. Carpenter*, 14 Gray, 127.

Respondents further contend that such way not having been used or claimed from about 1871 to the time when Martin, defendants' grantor, made the agreement with plaintiffs in 1890, the court should not presume any thing in defend-

ants' favor, but should hold that any way they may have had has lapsed by their failure to use or claim it.

The seventh finding is as follows: "That plaintiffs' land is adjacent to and contiguous on the west side of defendant Weston's land, and the county road running from Ygnacio valley to Pine cañon bounds plaintiffs' land on the west, and no county road runs through, adjacent or contiguous to defendant Weston's land; that defendants' grantors had no means of egress or ingress to and from said defendants' land to the county road except a road from plaintiffs' land traveled by defendants' grantors by a special agreement with plaintiffs."

This finding contains facts showing, when taken in connection with the facts hereinbefore stated, all that is necessary to create a way of necessity. It is true that it is found that Weston's grantors used a road across plaintiffs' land by a special agreement, but what that agreement was, or when made, is not stated. The answer to defendants' cross-complaint alleges that <sup>269</sup> J. West Martin (Weston's grantor) used it for a short time in 1890, under an agreement with the plaintiffs. It is not found, nor is it claimed by counsel, that it created a way or easement of a different character from a way of necessity, which became appurtenant to the land now owned by Weston. If it did it is apparent that plaintiffs could not maintain trespass for using it; while, if it did not, I fail to perceive how it could affect the existence of a way of necessity which, upon the partition, become appurtenant to the land. Besides, the facts found having shown that a way of necessity once existed, it must be presumed to continue until some fact found by the court shows that the right no longer exists. For all that appears from this finding, the "special agreement" may have been solely confined to the location of the way, or some like particular, consistent with, and appropriate to, the existence of the way of necessity. The way, having been created by the necessity for its use, cannot be extinguished so long as the necessity exists. The necessity, of course, ceases when another way has been acquired, or when, by the acquisition of other lands, the owner can reach the public road without traversing the land of others.

That defendant could have a way by condemnation under the statute does not affect his right: *Pernam v. Wead*, 2 Mass. 202, 203; 3 Am. Dec. 43; *Collins v. Prentice*, 15 Conn. 39; 38 Am. Dec. 61.



The findings that defendants have no right of way of necessity or otherwise, that they have not used the way except as trespassers, that plaintiffs have not designated any road, and that Weston does not deraign title from Blum, "except as hereinbefore stated," are conclusions of law from the facts found. It is immaterial whether plaintiffs or their grantors designated a road or way; as, if they did not, the owners of the dominant estate could designate it: *Kripp v. Curtis*, 71 Cal. 62, 65.

As all the facts necessary to support a judgment for the defendants have been found the judgment should <sup>370</sup> be reversed, with directions to the court below to enter judgment upon the findings for defendants, with costs.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be reversed, with directions to the court below to enter judgment for defendants according to the prayer of the cross-complaint.

HARRISON, J., GAROUTTE, J., PATERSON, J.

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**WAY OF NECESSITY BY PARTITION.**—A partition of real estate among heirs carries with it, by implication, the same right of way from one part to and over the other as had been plainly and obviously enjoyed by the common ancestor, in so far as it is reasonably necessary for the enjoyment of each part: *Ellis v. Bassett*, 128 Ind. 118; 25 Am. St. Rep. 421.

**PRIVATE WAYS IN EXISTENCE ARE A PART OF THE REALTY** and pass by a conveyance of the land: *De Rochemont v. Burlington etc. R. R.*, 64 N. H. 500; *Wolf v. Brass*, 72 Tex. 183; *Dorman v. Bates*, 82 Me. 438; *Alley v. Carleton*, 29 Tex. 74; 94 Am. Dec. 280, and note; *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550. A right of way to land devised over other land of the testator is appurtenant to the land, and passes by a conveyance of the land without express mention: *Lide v. Hadley*, 36 Ala. 627; 76 Am. Dec. 338. Easements are attached to the estate and follow the estate into the hands of an assignee: *Hills v. Miller*, 3 Paige, 254; 24 Am. Dec. 218, and note. See, also, on this subject the extended note to *Elliott v. Rhett*, 57 Am. Dec. 759.

**FOSTER v. BOARD OF POLICE COMMISSIONERS.**

[102 CALIFORNIA, 483.]

**MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—POWER TO AMEND ORDINANCES.**—If a state constitution provides that any city may make and enforce within its limits such local, police, sanitary, and other regulations as are not in conflict with general laws such city is thereby given power to legislate upon such subjects, and this includes the power to amend a pre-existing ordinance upon the same subject and obviates all necessity of authority therefor being conferred by its charter.

**CONSTITUTIONAL LAW.**—No LAW IS EX POST FACTO WITHIN THE MEANING OF THE CONSTITUTION UNLESS it applies to crimes and their punishment, or punishes a party for acts antecedently done which, when done, were not punishable at all, or were not punishable to the extent or in the manner described.

**MUNICIPAL CORPORATIONS—ORDINANCE, EX POST FACTO OPERATION OF.**—An ordinance respecting the licensing of saloons disqualifying any person from receiving such license who has carried on the business of selling or furnishing liquor in any place where females are suffered or procured to wait or attend in any manner on any person, and where also any musical, theatrical, or other public exhibition or performance was exhibited or performed, is not void as an *ex post facto* law. Therefore such license may be refused to a person who has been guilty of the acts specified, though they were not crimes nor disqualifications when committed, and though he agrees not to permit similar acts during the period for which the license is sought. The ordinance is not intended to punish crime, but merely to exclude persons from its benefit whose past conduct shows they are unfit to receive it.

**CONSTITUTIONAL LAW—DISCRIMINATION BETWEEN PERSONS AND CLASSES.** An ordinance is not void because of its discrimination between different classes of persons if it affects all persons of certain classes and as to them acts uniformly. Therefore, a municipal ordinance may prescribe that a license to sell liquor shall not be granted except upon certain conditions specified therein, and that persons who have been, or shall thereafter be, guilty of certain acts shall be excluded from the benefit of the ordinance if the acts so specified are such as probably render persons seeking the license unfit to exercise the privileges conferred by it.

**CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—AN ORDINANCE OF A CITY applicable to every part thereof is, as to such city, a general law, and not in conflict with the state constitution forbidding local legislation.

*Carroll Cook*, for the appellant.

*H. T. Cresswell*, for the respondent.

487 HAYNES, C. Appellant petitioned the superior court for a writ of mandate to compel the board of police commissioners to consent to the issuance to him of a license as a retail liquor dealer. An alternative writ was granted, and upon the return thereof the defendants demurred to the peti-

tion, and this appeal is from the judgment entered thereon dismissing the writ.

Appellant was the proprietor of the Bella Union Theater, and in connection therewith had a saloon in which, prior to May 1, 1893, females were employed to wait upon those who patronized his place of business. His license for the theater was from April 15 to September 15, 1893. His license for the sale of liquor expired June 1, 1893. On May 1st he closed his place of business for ~~498~~ repairs. On June 12, 1893, he applied to the license collector for a retail liquor dealer's license, and that officer refused to issue it, and gave as the ground of such refusal that the board of police commissioners had, in writing, directed him not to issue such license to appellant, for the reason that appellant, prior to that time, had employed and permitted females to wait upon customers therein.

The petition further alleged that he applied to said board of police commissioners for such consent, assuring them that "he did not intend, and would not, if such license was granted to him as requested, either procure or suffer any females to wait on or attend in any manner any person in his place of business," and also tendered a recommendation in writing of twelve citizens owning real property in the block in which his said business was to be carried on that such license be granted.

This application was denied, upon the ground that appellant had prior thereto employed and permitted females to wait upon customers in his said place of business, and the sole question to be determined upon this appeal is the validity of an ordinance approved July 28, 1880, known as order No. 1589, as amended May 22, 1893, by order No. 2637. The material part of the amended section, so far as this appeal is concerned, is as follows:

*"Provided, however, as a police measure for the suppression of public vice, immorality, and crime, that no license shall be granted under this section, upon the recommendation of citizens or otherwise, to any person who has been convicted of felony, or to any person who has carried on, is carrying on, or is about to carry on the business of selling or furnishing spirituous, malt, or fermented liquors or wines in any dance-cellar or dance-hall, or in any place where females are suffered or procured to wait or attend in any manner on any person, and wherein also any musical, theatrical, or other*

public exhibition or performance is exhibited or performed,<sup>489</sup> or in connection with any resort for lewd, immoral, or unlawful purposes."

Appellant contends that this ordinance is void, and bases this contention upon several grounds.

1. That the act of March 23, 1878, is a part of the consolidation act or charter of the city of San Francisco; that this act was not repealed by the constitution of 1879, and that the amended ordinance is in conflict therewith.

The second subdivision of section 4 of that act is as follows:

"Those making sales of less than fifteen thousand dollars per quarter shall pay a license of twenty dollars per quarter; *provided*, that on and after January 1, 1879, no license as a retail liquor dealer shall be issued by the collector of license unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but, in case of refusal of such consent upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer is to be carried on, or in the four blocks or squares bounding the same": Stats. 1877-78, p. 444.

It may be conceded that the constitution of 1879 did not repeal the act of 1878, but the act in question was purely local, applicable only to the city and county of San Francisco, and was upon a subject included within section 11 of article 11 of the constitution, which provides as follows:

"Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, or other regulations as are not in conflict with general laws."

The power to legislate upon such subjects thus given to the city necessarily includes the power to amend an <sup>490</sup> existing regulation upon the same subject; and this authority expressly given in the constitution obviates all necessity of any authority being given upon the same subject in the charter. Whilst this case presents some questions not heretofore considered by this court, the power of the board of supervisors to amend the former ordinance has been considered and decided: See *Ex parte Christensen*, 85 Cal. 208; *Crowley v. Christensen*, 137 U. S. 86; *Ex parte Hayes*, 98 Cal. 556; and in the case last cited it was held that the ordinance here in question is

a valid exercise of the power conferred by that provision of the constitution hereinbefore quoted.

It is further insisted by appellant that the amended ordinance in question, so far, at least, as it affects this case, is void: 1. Because it is *ex post facto*, and imposes a penalty and consequence for an act that was done prior to the passage of the order; 2. Because the ordinance is not equal and uniform in its operation; and 3. That it is special legislation.

1. The ordinance in question is not an *ex post facto* law within the meaning of the constitution of this state or of the United States. In *Watson v. Mercer*, 8 Pet. 88, 110, it was said: "The phrase, *ex post facto* laws, is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed."

In *Ogden v. Saunders*, 12 Wheat. 213, 267, in speaking of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, it was said: "The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil, character." And such is the uniform construction given by all the authorities.

The ordinance in question punishes no past act committed, done, or suffered to be done by appellant. It simply furnishes a standard applicable to all persons, by which their fitness to conduct a business, in itself dangerous to the morals and good order of the city, shall <sup>491</sup> be measured. As was said by Field, J., in *Crowley v. Christensen*, 137 U. S. 91:

"The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors has therefore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. There is no inherent right in a citizen thus to sell intoxicating liquors by retail": See, also, Cooley's Constitutional Limitations, 6th ed., 342.

In that case, after discussing other questions, the court further said:

"We, however, find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one

case convicted of the offense and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted, for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner."

If the past offenses of Christensen's wife were sufficient to justify a refusal to grant a license to him certainly the past conduct of appellant in employing females, though not then prohibited by law, is quite as conclusive evidence of his unfitness to conduct a saloon. His protestation that he did not intend, and would not in the future procure or permit, females to wait upon his customers does not aid him. A man who has in the past shown himself willing to debauch the morals of the community to increase his business would not in the future refrain from any line of conduct in the prosecution of his business which would not bring upon himself personally the penalty of the law, whatever of evil it might bring to others. The ordinance was therefore <sup>492</sup> not only constitutional, but wise, and should be scrupulously observed by those intrusted with its execution.

But appellant contends that the ordinance properly construed applies only to those who have, since its adoption, violated its provisions. But this construction cannot be sustained. The language is too explicit to admit it. Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before.

It is also insisted that the ordinance under consideration is objectionable for want of uniformity, and that it discriminates between different persons.

That it affects all persons of certain classes without discrimination, and as to them acts uniformly, cannot be questioned. The question, however, is as to the power to discriminate at all. The power thus to discriminate is well settled by the authorities hereinbefore cited, and by many others. This power is exercised in relation to many other

occupations besides that of selling liquor, and when promotive of the best interests of the people is always sustained.

The occupations of engineers and pilots on vessels, and of druggists, physicians, lawyers, and others are confined by law to persons having certain qualifications, and who are licensed therefor, upon the ground that the protection of the life, health, and welfare of the people at large require those who pursue these avocations to have those qualifications which will prevent, as far as possible, the evils which would result from ignorance and incompetency. Counsel, quoting from *Miller v. Kister*, 68 Cal. 142, 145, say: "The legislature cannot discriminate or grant an indulgence to one which is not accorded to another." But the legislature does discriminate, <sup>493</sup> and in many cases properly, whilst in those cases where the public are affected only by depriving an individual of a right common to all others the exercise of which is not attended with evil consequences the above quotation applies.

Nor is it special legislation. If it had been enacted by the legislature, being applicable only to the city and county of San Francisco, it would have been special legislation, because restricted to a portion of the state; but being enacted by the city and county under the authority of the constitution, and not restricted to a part of the city and county, it is, as to the city and county, a general law.

As to the supposed conflict with the laws of the state, that question is settled by *Ex parte Christensen*, 85 Cal. 208, and *Ex parte Hayes*, 98 Cal. 555.

Many other points are made by counsel for appellant, all of which have been considered, but as the points decided are necessarily conclusive of the case they need not be noticed here.

The judgment appealed from should be affirmed.

SEARLS, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

HARRISON, J., GAROUTTE, J., VAN FLEET, J.

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**EX POST FACTO LAWS.**—An *ex post facto* law is a law providing for the infliction of punishment upon a person for an act which, when committed, was innocent, or which aggravates a crime and makes it greater than when committed, or which changes the punishment, or inflicts greater punishment than the law annexed to the crime when committed: *People v. Hayes*, 140 N. Y. 484; 37 Am. St. Rep. 572, and monographic note in which the subject of *ex post facto* laws is thoroughly discussed.



**STATUTES—DISCRIMINATION BETWEEN PERSONS AND CLASSES.**—Laws, public in their objects, may be confined to a particular class of persons, if they are general in their application, to the cases to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy: *Allen v. Pioneer Press Co.*, 40 Minn. 117; 12 Am. St. Rep. 707, and note; *State v. Moore*, 104 N. C. 714; 17 Am. St. Rep. 696. This question will be found fully treated in the extended note to *State v. Ellet*, 21 Am. St. Rep. 780, and the notes to *State v. Sheriff*, 31 Am. St. Rep. 653; *State v. Hinman*, 23 Am. St. Rep. 25; *Allen v. Pioneer Press Co.*, 12 Am. St. Rep. 716, and *People v. Squire*, 1 Am. St. Rep. 903.

## MURPHY v. MULGREW.

[102 CALIFORNIA, 547.]

**ON A SALE OF CHATTELS BY A HUSBAND TO HIS WIFE, AN ACTUAL CHANGE OF POSSESSION** must take place as in other transfers of personalty. It cannot be dispensed with on the ground of the marital relations of the vendor and vendee and the fact that she appointed him as her agent to hold possession for her.

**TRANSFER OF CHATTELS—CHANGE OF POSSESSION.**—The fact that a vendor and vendee are husband and wife, or parent and child, constitutes no reason why the provisions of the statute requiring every sale of personalty to be accompanied by an immediate delivery, and an actual and continued change of possession should receive a construction different from that applicable to other cases.

**HUSBAND AND WIFE—SALE OF PERSONALTY—CHANGE OF POSSESSION.**—The filing by a wife of an inventory of her separate property in accordance with the code does not, as to any of such property acquired by purchase from her husband, dispense with the necessity of an immediate delivery, and an actual and continued change of possession, to render such change effective as against his attaching creditors.

**EVIDENCE—CHANGE OF POSSESSION.**—THE DECLARATIONS OF A VENDOR OF PERSONAL PROPERTY, while he remains in possession thereof, though after the sale, as to the character of his possession, are admissible in evidence against his vendee.

**EVIDENCE OF DAMAGES, WHEN SUFFICIENT.**—Evidence that plaintiff gave her note to her attorneys for two hundred dollars, as a fee for their services in the case, does not justify a finding that such sum is a fair compensation for time and moneys expended in the pursuit of the property sued for.

*Barham and Bolton*, for the appellant.

*A. B. Ware and J. T. Campbell*, for the respondent.

549 GAROUTTE, J. Plaintiff claims to have purchased two certain racehorses from her husband, Wyman Murphy, on January 11, 1890. On November 16, 1891, the defendant, as sheriff of the county of Sonoma, took possession of the horses

under a writ of attachment in favor of the Santa Rosa Bank, and against the husband, Wyman Murphy. The sheriff refusing to return the <sup>550</sup> possession to plaintiff upon demand she brought this action to recover the property. The appeal is from the judgment and order denying a motion for a new trial.

1. The main question here presented is, Do the facts disclosed by the record support the transfer by the husband to the wife, in view of the provisions of section 8440 of the Civil Code? In other words, Was there such an immediate delivery and actual and continued change of possession of the property as is contemplated by that statute? There is no substantial conflict in the evidence upon this point, and plaintiff herself testified in effect as follows regarding the transfer: "I resided with my husband upon the homestead at the time I purchased these horses from him. He gave me a bill of sale of them at that time, and they were in the barn a short distance from the house. Upon receiving the bill of sale, I put it away, and said in substance to him: 'You take charge of this property for me, and manage it for me.' The horses remained at the homestead after the bill of sale the same as before, and when we moved away we took them with us. My husband drove them all this time, and managed them just the same as before the bill of sale was made." From the evidence of the plaintiff it will be perceived that no actual change of possession of this property took place at the time of the delivery of the bill of sale; but, on the contrary, in all its surroundings it remained entirely *in statu quo*. Mrs. Murphy attempts to escape the legal effect of the foregoing evidence by the claim that she had appointed her husband her agent, to take the possession and control of the horses for her, and as such agent his possession was her possession, but there is nothing to be urged in favor of such a contention. Both the letter and the spirit of the law contained in section 8440 would be defeated by the recognition of such a principle. The object of the statute is to require notice to the world of the transfer of personal property, in order that men may be able to deal with each other upon equal terms and from a common level. The efficacy of the statute would be entirely <sup>551</sup> destroyed if the vendor were allowed to remain in possession of the property as the agent of the vendee, in the absence of any notice to the world of such a change of conditions. A practice of that

kind would be in direct conflict with the terms of the statute itself.

We do not find a syllable of evidence in the record that would indicate to the outside world that a change of ownership had taken place as to these horses, and we can hardly imagine a case where the provisions of the statute could have been more entirely disregarded. *Morgan v. Ball*, 81 Cal. 93, 15 Am. St. Rep. 34, is much stronger for the vendee in its facts; and the language relied upon by respondent, taken from the case of *Williams v. Lerch*, 56 Cal. 334, has been well and justly criticized in the case of *Etchepare v. Aguirre*, 91 Cal. 293; 25 Am. St. Rep. 180. The fact that a vendor and vendee are husband and wife, or parent and child, is no reason why the provisions of the statute should receive a different or more liberal construction. Those conditions give the statute no additional elasticity. The rule of construction is the same in all cases, and the relationship existing between the parties is a matter wholly immaterial: *McKee v. Garcelon*, 60 Me. 165; 11 Am. Rep. 200; *Hoffner v. Clark*, 5 Whart. 546.

2. The transfer of the property in litigation by bill of sale was made January 11, 1890, and upon December 30th following plaintiff filed an inventory of her separate property in the recorder's office, in accordance with the provisions of section 165 of the Civil Code. The Santa Rosa Bank became a creditor prior to the recording of the inventory, and the attachment proceedings upon the husband's indebtedness were begun November 16, 1891. It is now insisted by respondent that conceding no immediate delivery and actual and continued change of possession took place at the date of the bill of sale, still the subsequent recording of the inventory in the recorder's office of her separate property, including these horses, cured any defective compliance with <sup>552</sup> the provisions of section 3440, and gave her good title against the world from that day. It is unnecessary to pass upon the scope and purpose of section 165 of the code. Whatever may be its scope and purpose we are well satisfied it is not entitled to a construction that would nullify the provisions of section 3440 as to fraudulent transfers of personal property.

3. The court committed error in not allowing declarations of the vendor Murphy as to the character of his possession after the sale, and while he was in the actual possession of the property: Bump on Fraudulent Conveyances, 3d ed.,

588; Waite on Fraudulent Conveyances, sec. 279; *Cahoon v. Marshall*, 25 Cal. 197; *Blake v. Graves*, 18 Iowa, 312.

4. The evidence is insufficient to justify the finding of the court that two hundred dollars is a fair compensation for the time and money expended by the plaintiff in the pursuit of the property. All the evidence bearing upon this question is the fact that plaintiff gave her note for two hundred dollars to her attorneys as a fee for their services in the case. This fact is wholly insufficient to support the judgment in that regard.

For the foregoing reasons, it is ordered that the judgment and order be reversed, and the cause remanded.

HARRISON, J., and VAN FLEET, J., concurred.

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**SALES BETWEEN HUSBAND AND WIFE—NECESSITY FOR DELIVERY.**—To render a sale of personal property by a husband to his wife valid as against the creditors of the vendor there must be an apparent and exclusive change of possession from the vendor to the vendee: *Wheeler v. Selden*, 63 Vt. 429; 25 Am. St. Rep. 771, and note; *McKee v. Garcelon*, 60 Me. 165; 11 Am. Rep. 200.

**EVIDENCE—SALES OF PERSONALTY—DECLARATIONS OF VENDOR AS AGAINST VENDEE.**—Evidence of what a vendor of chattels did and said after the sale is admissible against his vendee, if it is pertinent to the issue whether or not the sale had been accompanied by an immediate delivery and followed by an actual change of possession: *Etchepare v. Aguirre*, 91 Cal. 288; 25 Am. St. Rep. 180. As a general rule, the declarations of a vendor made after he has parted with his title are not admissible in evidence to affect the title of the vendee, but where the vendor remains in actual possession of the goods his statements explanatory of such possession are admissible for the purpose of showing fraud in the sale: *Grant v. Lewis*, 14 Wis. 487; 80 Am. Dec. 785, and note; *Smith v. Boyer*, 29 Neb. 76; 26 Am. St. Rep. 373; *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114, and note. The declarations of a vendor made after he has transferred property are not admissible as against his transferee to impeach the transfer: *Welcome v. Mitchell*, 81 Wis. 566; 29 Am. St. Rep. 913, and note; *Perry v. Smith*, 4 Yerg. 323; 26 Am. Dec. 236, and note; *Thomas v. Black*, 84 Cal. 221. See, also, the extended notes to *Paige v. Cagwin*, 42 Am. Dec. 80; *Horton v. Smith*, 42 Am. Dec. 631; *People v. Vernon*, 95 Am. Dec. 70; and the notes to *Mulholland v. Ellitson*, 78 Am. Dec. 499, and *Redfield v. Buck*, 95 Am. Dec. 245.

## REDMOND v. PETERSON.

[102 CALIFORNIA, 596.]

**PARTY TO ACTIONS—INFANTS.**—Though a guardian of an infant or insane defendant should appear for him, such guardian is no more a party to the action than is his attorney therein.

**JURISDICTION—INFANTS AND INCOMPETENTS, ENTERING APPEARANCE OF IN ACTIONS.**—The general guardian of an infant or incompetent person has authority, without the service of any process whatever, to enter the appearance of his ward in an action pending against him, and such appearance confers jurisdiction upon the court to the same extent as if the process had been personally served in the manner prescribed by the statute.

**JURISDICTION—CHANGE OF PARTIES.**—If a suit is brought against the guardian of an infant or incompetent person, and without any order of court an amended complaint is subsequently filed from which such guardian is dropped as a party defendant and his ward named in his place, and after the appearance of the ward by his guardian a judgment is entered upon such complaint, it is valid and not subject to reversal upon appeal.

*Edward A. Holman and Frederick V. Wood*, for the appellants.

*Shadburne and Herrin, M. C. Barney, R. E. Ragland, Charles J. Heggerty, and William M. Madden*, for the respondents.

596 The COURT. Appeal from a judgment against said incompetent, Hannah J. Peterson, in favor of the plaintiff, and from a judgment in favor of the defendant Liberty S. Henderyckx, as executor of R. S. Henderyckx, upon his cross-complaint, against said Peterson, and also from an order denying the motion of said Peterson, by her guardian, to set aside said judgments.

The action was brought by the plaintiff to foreclose a mortgage executed by R. S. Henderyckx (since deceased) to Hannah J. Peterson, to secure a promissory note made by the mortgagor to the mortgagee, and which 597 note and mortgage were afterwards assigned to the plaintiff.

Afterwards said Peterson purchased the mortgaged premises from Henderyckx, and executed a mortgage thereon to him to secure a part of the purchase money.

After these transactions, and prior to the commencement of this suit, defendant Peterson was adjudged by the superior court "to be a person of unsound mind and an incompetent," and the defendant Gottshall was appointed the guardian of her person and estate.

This action was brought by the plaintiff against "Louis Gottshall, guardian of the estate and person of Hannah J. Peterson, an incompetent, and Liberty S. Henderyckx, executor of the estate of R. S. Henderyckx, deceased," said Peterson not being made a party.

Gottshall demurred, upon the ground that the complaint did not state a cause of action against him as guardian. Thereupon, without any ruling upon the demurrer, or order of court bringing in a new party, the plaintiff amended his complaint, and made the incompetent a party.

To this complaint Gottshall and Peterson filed a general demurrer, which was overruled by the court, and said defendants answered. The executor of Henderyckx answered, and also filed a cross-complaint against Peterson to foreclose the junior mortgage, and Gottshall and Peterson answered the cross-complaint. Findings and judgments went against Peterson, both upon the complaint and cross-complaint, the judgment being entered May 26, 1892.

On May 22, 1893, pursuant to notice previously given, the attorney for Gottshall and Peterson moved the court to set aside the said judgment, upon the following grounds:

"1. That said purported amended complaint was filed herein without the leave or order of this court.

"2. That said purported amended complaint does not constitute an amended complaint in this action.

"3. That said Hannah J. Peterson, an incompetent, ~~was~~ was never made a party to this action by any order of this court or otherwise; and,

"4. That said purported amended complaint does not constitute a cause of action as to said Hannah J. Peterson, an incompetent."

This motion was overruled, and a bill of exceptions taken in which the grounds of the motion above recited are set out, and the statement is also made that "in support of said motion said defendant introduced in evidence the papers, files, records, and proceedings in this action," and an affidavit that no order was made or entered permitting the plaintiff to file an amended complaint, or to make said Peterson a party, and that said amended complaint was filed, and said Peterson made a party without any order or leave of the court. Said motion was denied. None of the "papers, files, records, and proceedings" in the action are set out in the bill of

exceptions, and no other evidence for or against the motion was given, except the affidavit above mentioned.

Neither the findings nor the judgment recite or allude to the service of process upon any of the defendants, but both state that the defendants appeared by their respective attorneys, naming the attorneys of each. That no cause of action existed against the guardian, from whom alone a recovery was sought in the original complaint, there is no question whatever. He was neither a necessary nor a proper party to the action. In *Emeric v. Alvarado*, 64 Cal. 593, in speaking of infants, the court said: "The guardian is to appear for them, and is no more a party to the action than the attorney who appears in an action for one who has attained his majority is a party to the suit in which he enters his appearance." That no order was made permitting or directing a new party to be brought in, and the complaint amended by adding the sole party liable, is sufficiently clear upon the record. Nor does it appear upon the record that any process was served upon the incompetent, either before or after the amended complaint was filed, but it does appear that Peterson, the incompetent <sup>500</sup> person, appeared by attorney, and jointly with her guardian filed an answer to the amended complaint.

Under the foregoing facts the question is: Did the court have jurisdiction over the defendant Peterson, who was alleged in the complaint and found by the court to have been "a person of unsound mind and incompetent?" And the solution of this question depends solely upon the fact as to whether or not a general guardian of an incompetent or infant defendant has the power to appear in an action without service of summons upon the ward. It has been held by this court in several cases that the appointment and appearance of guardians *ad litem*, without a personal service of summons upon the incompetent, was void: *Gray v. Palmer*, 9 Cal. 638; *Johnston v. San Francisco Savings Union*, 63 Cal. 554; *McCloskey v. Sweeney*, 66 Cal. 53. It is very apparent in these cases that such of necessity must be the law, for the court has no authority to appoint a guardian *ad litem* until the personal service upon the infant or incompetent has first been made. But the rule in this state as to general guardians is not in line with the foregoing cases. In *Smith v. McDonald*, 42 Cal. 484, it is declared a rule of property that a general guardian has the power to waive a personal service upon the



ward in the following explicit terms: "Under such circumstances it has risen to the importance of a rule of property, and even though it were conclusively shown to have been, as an exposition of the statute it attempted to construe, incorrect at the outset, I think it nevertheless our duty to maintain it now, and not permit it to be disturbed. If its operation for eight years in practice has shown it to have unnecessarily facilitated the despoliation of the estate of infants, it certainly is not for us to abrogate it for such a reason." The doctrine here enunciated has been followed in various cases since that time, and if, when *Smith v. McDonald*, 42 Cal. 484, was decided, the principle had then become a rule of property, it is certainly impregnable to attack at the ~~600~~ present day. Its overthrow would result in disaster and ruin to many innocent holders of real estate, who have purchased upon their counsel's advice that such was the law.

Having arrived at the foregoing conclusion the case presents itself exactly as though a party were here attacking a judgment rendered against him by a court having jurisdiction of the subject matter of the action, where he had voluntarily appeared, filed an answer to the merits of the complaint, and gone to trial upon the issues made by his pleading. We do not see how the fact that he was brought into the action by an amended complaint, rather than by the original, is now material, nor is it material that the first defendant sued was wrongly sued, and that he, the incompetent, alone was the only proper party to the action. It is sufficient to say to all his present complaints in this direction that he voluntarily came into court and submitted himself to its jurisdiction for all purposes. A judgment rendered against him under these circumstances is beyond all doubt binding, and in full force and effect as far as any question of personal jurisdiction is concerned.

The judgments and order appealed from are affirmed.

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GUARDIAN AND WARD.—POWER OF GUARDIAN TO WAIVE SERVICE OF PROCESS ON MINOR: See the note to *Clark v. Thompson*, 95 Am. Dec. 461, and the extended note to *Joyce v. McAvoy*, 89 Am. Dec. 186, 187.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**COLORADO.**

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**MAYOR OF VALVERDE v. SHATTUCK.**

[19 COLORADO, 104.]

**CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—When part only of a legislative act is void, the residue may sometimes be upheld, but judicial authority cannot substitute any thing in place of the void part. If the residue of the act cannot stand with the part cast out, then the whole must fall; and if the statute has but one object, and its provisions for the accomplishment thereof are void, the whole act is void.

**CONSTITUTIONAL LAW—LEGISLATIVE POWERS OVER MUNICIPAL CORPORATIONS.**—The legislature, as a general rule, has plenary power in respect to municipal corporations. The courts uphold legislative acts relating thereto, unless their unconstitutionality is clearly and palpably apparent.

**CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ANNEXATION—ELECTIONS.**—A statute requiring the question of annexation to a municipality to be submitted at an election to the determination of the taxpaying electors thereof, is not unconstitutional as requiring a property qualification. The word "election," as used in the constitution, refers only to elections of public officers.

**CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—The term "township," within the meaning of a constitutional provision prohibiting special legislation regulating county and township affairs, refers to an involuntary corporation or *quasi* corporation, as a subdivision of a county, and not to a voluntary municipal corporation, such as a city or town. Special legislation is not prohibited in respect to the latter except when a general law can be made applicable.

**MUNICIPAL CORPORATIONS—POWER TO REGULATE LIQUOR TRAFFIC.**—Municipal authorities of incorporated towns and cities may be invested with power to license, regulate, prohibit, or suppress, within their limits, the traffic in intoxicating liquors, subject to the general laws of the state; and under such power they may permit such traffic in one part of the city and prohibit it in another part.

**CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ALDERMANIC REPRESENTATION.**—It is not imperative that there shall be aldermanic representation in towns and cities under the constitution of Colorado.

**CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ANNEXATION—EXISTING INDEBTEDNESS.**—The legislature, on changing, dividing, or annexing municipal corporations, may make provision concerning existing indebtedness, and its power so to do, unless restrained by special constitutional provision, is clear and ample.

**MUNICIPAL CORPORATIONS — ANNEXATION — CONSTITUTIONAL LAW.** — The legislature may not only originally fix the limits of a municipal corporation, but may, unless specially restrained by the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, or even against the remonstrance of the majority of the residents of the corporation, or of the annexed territory. It is no constitutional objection to the exercise of such power of compulsory annexation that the property thus brought within the corporate limits is subject to taxation to discharge a pre-existing municipal indebtedness. This is a matter, in the absence of special constitutional restriction, wholly within the legislative discretion.

**MUNICIPAL CORPORATIONS—ANNEXATION—CONSTITUTIONAL LAW.**—A statute whereby one municipal corporation becomes annexed to another, forming a consolidated municipality, the survivor assuming all the debts and taking all the corporate property of the annexed municipality, together with authority to levy and collect taxes throughout the enlarged municipality, is not an act retrospective in its operation; nor does it impose on the people of either municipality a new liability in respect to transactions or considerations already past.

**SPECIAL** proceeding under a statute praying for the dissolution of the town of Valverde, and its annexation to the city of Denver. In such proceeding the county court made an order requiring the mayor and trustees of the town of Valverde to call an election for the purpose of determining the question of dissolution and annexation. This order required the question to be submitted to a vote of the qualified electors of such town at such election. The mayor and trustees of the town appeared and prayed that the order be vacated, on the ground that the statute under which it was obtained was unconstitutional. The court adjudged said act to be void, in so far as it prescribed a property qualification for voters, but otherwise to be valid; and modified its order so as to require the submission of said question by ordinance to a vote of qualified electors at an election to be called "without regard to the payment of a property tax by them." The mayor and trustees appealed from this judgment. The following provisions of the Colorado constitution are referred to in the opinion:

**ARTICLE 10.**

**"SEC. 7.** The general assembly shall not impose taxes

for the purposes of any county, city, or town, or other municipal corporation, but may by law vest in the corporate authorities thereof respectively the power to assess and collect taxes for all purposes of such corporation."

#### ARTICLE 11.

"SECTION 1. Neither the state, nor any county, city or town, township, or school district, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner, to, or in aid of, any person, company, or corporation, public or private, for any amount, or for any purpose whatever, or become responsible for any debt, contract, or liability of any person, company, or corporation, public or private, in or out of the state."

"SEC. 8. No city or town shall contract any debt by loan in any form, except by means of an ordinance, which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged, specifying the purposes to which the funds to be raised shall be applied, and providing for the levy of a tax, not exceeding twelve (12) mills on each dollar of valuation of taxable property within such city or town, sufficient to pay the annual interest and extinguish the principal of such debt within fifteen, but not less than — years from the creation thereof; and such tax, when collected, shall be applied only to the purposes in such ordinance specified, until the indebtedness shall be paid or discharged. But no such debt shall be created unless the question of incurring the same shall at a regular election for councilmen, aldermen, or officers of such city or town, be submitted to a vote of such qualified electors thereof as shall, in the year next preceding, have paid a property tax therein, and a majority of those voting on the question, by ballot deposited in a separate ballot-box, shall vote in favor of creating such debt; but the aggregate amount of debt so created, together with the debt existing at the time of such election, shall not, at any time, exceed three per cent of the valuation last aforesaid. Debts created for supplying water to such city or town are excepted from the operation of this section. The valuation in this section mentioned shall be in all cases that of the assessment next preceding the last assessment before the adoption of such ordinance."

#### ARTICLE 15.

"SEC. 12. The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual

or association of individuals, retrospective in its operations, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already past."

*J. W. Helbig*, for the appellants.

*F. A. Williams, and Helm and Goudy, and P. Rogers*, for the appellees.

<sup>107</sup> **ELLIOTT, J.** The assignments of error are to the effect: 1. That the final judgment, or modified order, of the county court is contrary to the terms of the annexation act under which this proceeding was instituted; and 2. That the act itself is unconstitutional and void.

1. That the modified order does not follow the terms of the act is apparent from the language of sections 2 and 5, hereinafter quoted: See Sess. Laws 1893, p. 451, et seq.

The county court evidently concluded that the objection to the statute on the ground of its supposed unconstitutionality, might be obviated by rejecting that part prescribing a tax-paying qualification for voters, and that the residue of the statute might be upheld. A brief examination of the object <sup>108</sup> and purpose of the act will show whether such conclusion is correct or otherwise.

The object of the act in question is to provide for the annexation of contiguous towns and cities. Section 2 requires that the question of dissolution and annexation be submitted "to a vote of such of the qualified electors of such town or city [to be annexed] as have in the year next preceding paid a property tax therein."

Section 5 further provides that "no ballot on the question submitted shall be received by the judges of election unless the person offering the same shall be a duly qualified voter in the election precinct in which he offers to vote, and entitled to vote in such precinct at said election, and, in addition thereto, shall have in the next year preceding said election paid a property tax in said town or city."

Section 8 provides that if a majority of the votes so cast shall be "for annexation," a report showing the result of the election shall be duly prepared, certified, and filed in the office of the clerk of the county court; that the court shall examine the same, and, if satisfied that the proceedings have been regular, shall approve the report; and that, from and after such approval, such town or city shall be dissolved and

the territory then included between the boundaries thereof shall be and become annexed to, and part of, the city existing under special charter.

Those provisions, which require the submission of the question of dissolution and annexation to the determination of tax-paying electors, lie at the very foundation of the act itself. If a majority of the votes be "for annexation," and the proceedings be found regular, annexation is accomplished; otherwise, nothing is accomplished. It follows that if the provision prescribing the qualifications of voters be unconstitutional then the whole act is unconstitutional. The legislature has not, by the terms of the act, consented that a town or city may be dissolved or become annexed to another, except by a majority vote of electors having the qualifications prescribed by the act itself. The reception of ballots from persons not <sup>100</sup> having such qualifications is strictly forbidden. A majority vote by electors thus qualified is, therefore, the essential condition to the accomplishment of annexation.

The courts will go far in giving a legislative act a particular construction rather than declare it unconstitutional. But the act in this instance is so clear and specific in respect to the qualifications of voters, that there is no room for judicial construction. It is true that where part only of a legislative act is void the residue may sometimes be upheld; but judicial authority cannot substitute any thing in place of the void part. If the residue of the act cannot stand with the void part cast out then the whole act must fall.

The statute under consideration in this case has, as we have seen, a single object—the dissolution of incorporated towns and cities, for the purpose of annexing their territory to another city—in a word, the object is annexation. The dissolution is preliminary to, and inseparable from, annexation; and those provisions which prescribe the means and procedure to be pursued are incidental or auxiliary to the same end. So, also, the remaining provisions are dependent upon and follow the accomplishment of the single object, annexation. If those provisions of the act which prescribe the essential condition upon which annexation is made to depend be unconstitutional the principal object of the statute fails, and the whole act fails: *Cooley on Constitutional Limitations*, \*177, et seq.; *In re House Bill No. 165*, 15 Col. 593; *Reed v. Omnibus R. R. Co.*, 33 Cal. 212; *Commonwealth v.*

*Potts*, 79 Pa. St. 164; *St. Joseph etc. R. R. Co. v. Buchanan County Court*, 39 Mo. 485.

The order of the court requiring the submission of the question to voters other than those prescribed by the statute was erroneous, whatever view may be taken of the statute itself. If the act be found valid the question must be submitted to such electors as the act specifies; if the act be found unconstitutional, the proceeding must be dismissed.

2. Is the act in question unconstitutional? This question has been ably argued by counsel *pro* and *con*; it must now <sup>110</sup> be determined in order that the county court may properly dispose of the proceeding.

In general the legislature has plenary power in respect to municipal corporations. But, in this state, legislative power has been so hedged about by constitutional restrictions that we are confronted with many difficulties in this as in other cases. We are not, however, unmindful of the oft-repeated rule that the courts will not declare a legislative act unconstitutional, unless its unconstitutionality is clearly and palpably apparent. See *People v. Wright*, 6 Col. 96, wherein it is said: "The powers of the general assembly are plenary, subject only to constitutional restraints, expressed or implied. To authorize an implied restraint the implication must be a necessary one."

See, also, *Wadsworth v. Union Pac. Ry. Co.*, 18 Col. 600, 36 Am. St. Rep. 309, wherein it is said: "So long as a legislative act is within the sphere of legislative power—that is, so long as it is not an encroachment upon the province of some other department of the government, it will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured. The conflict between the legislative act and some specific provision of the fundamental law must, in general, be clearly apparent, or the act will not be deemed unconstitutional."

Municipal corporations are organized to promote the prosperity and secure the happiness of people living in compact communities. Police and sanitary regulations different from the general laws of the state are conducive, and, in many instances, essential, to the welfare of the inhabitants of cities and towns. As such municipalities increase in population territorial enlargement and public improvements of different kinds, as well as modifications of the local government,



become necessary to the enjoyment of life, the protection of health, and the security of property, public and private.

3. It is contended that the act under consideration is unconstitutional because a property qualification is required to <sup>111</sup> entitle an elector to vote upon the question of dissolution and annexation. In support of this contention section 1 of article 7 of the constitution is relied on; it reads as follows:

"SECTION 1. Every male person over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections:

"*First.* He shall be a citizen of the United States, or, not being a citizen of the United States, he shall have declared his intention, according to law, to become such citizen, not less than four months before he offers to vote.

"*Second.* He shall have resided in the state six months immediately preceding the election at which he offers to vote, and in the county, city, town, ward, or precinct, such time as may be prescribed by law; *Provided*, That no person shall be denied the right to vote at any school district election, nor to hold any school district office, on account of sex."

It will be observed that no property qualification is specified in the foregoing section; hence, if an elector has the qualifications therein specified, he is entitled to vote at all elections contemplated by said section. If the term "elections," as therein used, be held to include such an election as is provided for in the act now under consideration, then the act cannot be upheld. That the word is not used in such a comprehensive sense may be inferred from the fact that elsewhere in the constitution wherein the creation of public indebtedness is provided for, the right to vote is restricted to such qualified electors as shall, in the next year preceding, have paid a property tax: See art. 11, secs. 6-8. These provisions of article 11 were framed at the same time as article 7, and, if they had been considered exceptions, they would doubtless have been noted as such in article 7 by the usual phrase, "except as in this constitution otherwise provided," as was done in other parts of the original constitution: See art. 5, sec. 30; art. 6, secs. 1, 2.

It is manifest that some restriction must be placed upon the phrase "all elections," as used in section 1, else every person having the qualifications therein prescribed might insist upon <sup>112</sup> voting at every election, private as well as public, and thus interfere with affairs of others in which he has no

interest or concern. In our opinion, the word "elections" thus used does not have its general or comprehensive signification, including all acts of voting, choice, or selection, without limitation, but is used in a more restricted political sense—as elections of public officers. This view is consistent with the title of article 7, "Suffrage and Elections," and is also in harmony with the residue of the article: See Century Dictionary; also, Webster's Dictionary, and Bouvier's Law Dictionary; Am. & Eng. Ency. of Law, title "Elections."

In *In re Nominations to Public Offices*, 9 Col. 631, a bill relating to primary elections was held to be "a proper subject of legislation, entirely within the legislative power"; and the bill as passed excludes voters from voting who in good faith belong to another political party than the one holding the primary election: Sess. Laws 1887, p. 347, et seq. Thus we have a judicial decision of our own state, limiting somewhat the phrase, "all elections" as used in article 7.

In the absence of any specific constitutional provision to the contrary the legislature may choose any appropriate agency whereby to change, modify, or disincorporate municipal corporations: 1 Dillon on Municipal Corporations, 4th ed., secs. 54, 63, 185; *People v. Fleming*, 10 Col. 553; *Cheaney v. Hooser*, 9 B. Mon. 330; *Marshall v. Donovan*, 10 Bush, 681; *Buckner v. Gordon*, 81 Ky. 665; *Blanchard v. Bissell*, 11 Ohio St. 96; *Graham v. City of Greenville*, 67 Tex. 62

Counsel for plaintiffs in error refers to the constitutional provision that "the general assembly shall provide by general laws for the organization and classification of towns and cities": Const., art. 14, sec. 13. Such provision does not, however, prohibit the dissolution of towns and cities thus organized by any appropriate exercise of legislative power. We find nowhere in the constitution any provision forbidding the submission of the question of dissolution or annexation to the determination of tax-paying electors. Such electors presumably have greater interest than others in questions affecting public indebtedness, or rate of taxation in the municipality where their property is taxable. As we have seen, the qualifications prescribed by the act are analogous to those prescribed in the constitution itself, where similar interests are at stake.

These views are not in conflict with the opinion *In re Extension of Boundaries of City of Denver*, 18 Col. 288. The precise point decided in that case is summed up by the court as

follows: "In our opinion the power of the legislature to annul the corporate existence of the adjoining towns by an amendment to the special charter of the city of Denver, as provided by the bill submitted, must be denied."

The court did not hold that the legislature was powerless to disincorporate a town or city existing under general laws, nor that a majority vote of all the qualified electors of such a municipality was essential to its disincorporation.

The case at bar is unlike the case of *State v. Williams*, 5 Wis. 308, 68 Am. Dec. 65, where the constitution itself expressly provided who should be entitled to vote at an election for the removal of a county seat. Section 5 of article 11 of our constitution contains a similar provision in relation to voting for the creation of a debt for public buildings. Neither the Wisconsin case nor section 5 militates against the view we have taken.

We do not feel justified in declaring the act unconstitutional on the ground that the question of annexation is required to be submitted to the determination of tax-paying electors.

4. It is further contended that the annexation act is local or special legislation; and, hence, in conflict with section 25 of article 5 of the constitution. The only specially enumerated case forbidden by section 25, to which the present act can be compared, is "regulating county or township affairs." The present act affects and regulates the affairs of towns and cities, but not the affairs of townships. The term "township," in the legal nomenclature of this state, refers to an involuntary corporation, or quasi corporation, as a subdivision<sup>114</sup> of a county, and not to a voluntary municipal corporation such as an incorporated town: *County Court of Garfield County v. Schwarz*, 13 Col. 291; *Booth v. County Court*, 18 Col. 561; 1 Dillon on Municipal Corporations, secs. 22, 23; *Kelly v. Meeks*, 87 Mo. 396

The act is general in form. Of necessity, it has some special characteristics. But considering the subject matter of the legislation we are not prepared to say that a more general law could be made applicable. Hence, its enactment is not inhibited by the latter clause of section 25. In general the power of a state legislature to pass an act will be presumed to exist unless the contrary clearly appears.

5. It is urged that the act is unconstitutional because of certain excise provisions. The objection is that it continues

in force the ordinances of an annexed town or city, prohibiting or regulating the sale of intoxicating liquors within the original limits of such town or city, and that such ordinances cannot be repealed without the consent of the voters of such annexed territory. This objection is not maintainable. It has never been questioned in this state, so far as we are advised, that the municipal authorities of incorporated towns and cities may be invested with power to license, regulate, prohibit, or suppress the traffic in intoxicating liquors, subject to the general laws of the state. The controversy has been whether the local municipal government might nullify or suspend the general laws of the state relating to tippling-houses within the limits of such towns or cities: See *Huffsmith v. People*, 8 Col. 175; 54 Am. Rep. 550; also *Heinssen v. State*, 14 Col. 237.

It is this state the policy of our legislation has been to invest local municipal governments with large powers in respect to the traffic in intoxicating liquors. And the different towns and cities have resorted to high license, low license, local option, prohibition, or partial prohibition, as the popular will has been manifested through the local municipal officers; and so dramshops have been permitted in one part of a city or town and prohibited in another part. For example, in Denver, sometimes by the charter, sometimes by ordinance, <sup>115</sup> the petition or consent of a majority of the property owners within restricted limits has been made a condition to the licensing of saloons; and, again, the sale of intoxicating liquors has been forbidden within a certain distance of public schools and churches. The legality of such conditions and restrictions has never been judicially denied, so far as we are advised. The objections to the excise provisions of the act in question do not render the act unconstitutional; nor do they present any insuperable obstacle to annexation. They need not, therefore, be further reviewed in the present proceeding: *People v. Cregier*, 138 Ill. 401.

6. It is objected that people living in the original territorial limits of an annexed town or city can have no representation in the board of aldermen of the city to which such town or city becomes annexed. This objection is not well founded. Provision is made for such representation, though a case may occur in which such representation may be suspended for a brief time. Compare section 18 of the act under consideration with section two of the Denver charter of 1893: Sess.

Laws, p. 135. The objection cannot be considered serious; it does not affect the constitutionality of the act. No constitutional provision has been cited making it imperative that there shall be local aldermanic representation in towns or cities in this state. The cases cited by counsel for plaintiff in error on this point bear little analogy to the present case: *Warren v. Mayor etc.*, 2 Gray, 84; *People v. Maynard*, 15 Mich. 463; *Lanning v. Carpenter*, 20 N. Y. 447.

7. It is contended that section 10 of the Annexation Act violates certain constitutional provisions relating to taxation and municipal indebtedness. The section reads as follows:

"SEC. 10. Whenever in pursuance of this act any town or city existing under general laws shall be annexed to any city existing under a special charter all rights, causes of action, records, uncollected revenues, and other property of the town or city so annexed shall accrue to, and become the property of, the city so enlarged; and all valid indebtedness of any <sup>116</sup> town or city so annexed, and of the city existing under a special charter, shall be paid by general taxation upon all the taxable property within the city existing under a special charter, including the territory formerly included in the town or city so annexed. At least a proportionate share of the moneys of the city so enlarged, available for water service, lights, and other public improvements, shall be expended each year within the territory formerly included within the town or city so annexed, based upon the assessed valuation thereof; and the water and light service of any town or city so annexed shall not be curtailed after such annexation": Sess. Laws, 1893, p. 455.

Unless the foregoing section conflicts with some express provision of the constitution there can be no doubt of its wisdom and propriety. Speaking upon this subject Mr. Justice Dillon says: "It is usual, however, for the legislature, on the change or division of municipal and public corporations, to make provision concerning existing indebtedness; and its power to do so, unless restrained by special constitutional provision, is clear and ample": 1 Dillon on Municipal Corporations, sec. 173.

The constitutional provisions which section 10 of the Annexation Act is supposed to violate will be briefly noticed.

Of article 10, section 7: It is a sufficient answer to the objection based on this section to remark that the general assembly has not by section 10 of the Annexation Act under-

taken to "impose taxes for the purposes of any county, city, town, or other municipal corporation." On the contrary, it has by said section vested in the corporate authorities of the surviving city the power to assess and collect taxes throughout its entire extent, including its enlarged boundaries, for all the purposes of such enlarged corporation.

Of article 11, section 1: This section is to be construed as prohibiting a town or city by its own voluntary corporate act from pledging its credit to, or becoming responsible for, any debt, contract, or liability in aid of a third party. Certainly, in the case at bar, the town of Valverde is not called upon <sup>117</sup> to pledge its credit to, or become responsible for, any person, company, or corporation. If annexation takes place the town of Valverde ceases to exist as a municipal corporation. It is true that by annexation the city of Denver becomes responsible for the municipal indebtedness of Valverde, if any there be existing when annexation takes place; but by annexation the territory of Valverde is added to the city of Denver, and becomes, *ipso facto*, an integral part of its new and enlarged boundaries, and so the indebtedness for which the enlarged city becomes responsible is its own indebtedness for and on its own account, and is no longer a debt or obligation of a third party. It may be observed also in this connection that the corporate property of Valverde in case of annexation becomes the property of the enlarged city the moment annexation takes place.

Of article 11, section 8: It is contended that section 10 of the Annexation Act contains a threefold violation of this section. The argument is that it affects or may affect the rights of the town of Valverde, of the city of Denver, and of the creditors of both municipalities. It is true taxation of property situate in the territory formerly embraced within the corporate limits of Valverde or of the city of Denver may be increased or decreased by annexation, though it is not made to appear that there will be any change. In any event section 8 does not contain any guaranty that there shall be no increase of taxation in case of the enlargement of municipal boundaries, nor has our attention been called to any other constitutional provision to that effect.

By annexation no debt is contracted by loan, either by the town of Valverde or by the city of Denver, nor is any debt contracted at all by the town of Valverde as a municipal corporation, since the town, as such, ceases to exist as soon as

dissolution and annexation take place. The annexation of Valverde may increase, or it may decrease, the taxes of those owning property situate within the original limits of Valverde or of Denver; it may or may not subject property within such limits to pre-existing municipal indebtedness; in any <sup>118</sup> event these circumstances constitute no legal or constitutional objection to annexation. Objections to as well as arguments for annexation, based upon such supposed increase or decrease of taxation, rest wholly upon grounds of expediency, and do not affect the legal or constitutional rights of either municipality, or of the residents thereof. Upon this subject Judge Dillon speaks with his usual clearness, as follows:

“Not only may the legislature originally fix the limits of the corporation, but it may, unless specially restrained by the constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the legislature to determine”: 1 Dillon on Municipal Corporations, 4th ed., sec. 185.

The rights of creditors are amply protected by the Annexation Act. They have the joint resources of the two municipalities as security for the municipal indebtedness of each. They have a responsible municipal government upon which every kind of legal process may be had for the collection and enforcement of their respective claims. In case of antecedent indebtedness contracted by loan in pursuance of an ordinance of any town or city, such ordinance, by virtue of the constitution, survives all changes of organization, government, or boundaries, which may befall the municipality, until such indebtedness shall have been fully paid and discharged. In case such town or city be dissolved by annexation to another the municipal officers of the surviving corporation may be compelled by *mandamus* to levy and collect taxes for the payment of such indebtedness, the same as if they were officers of the original corporation; and, for the purpose of more <sup>119</sup> completely protecting, paying, and discharging such indebted-



ness, such officers may, if necessary to the security of creditors, be required to levy, collect, and keep separate the taxes collected from the property situate within the limits of the original municipalities respectively, any law of the state to the contrary notwithstanding. The constitution of the United States provides that no state shall pass any law impairing the obligation of contracts. This applies to the constitutions of the several states as well as to statutes enacted by state legislatures. The constitution of this state contains a similar provision.

It is true section 8 of article 10 of our constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." In view of this provision it is urged with much force that the Annexation Act cannot be upheld, since the contingency may occur in which the municipal authorities of the enlarged city may have to depart from the uniformity rule in levying taxes. For example, original Valverde property may have to be subjected to a certain rate of taxation to meet original Valverde indebtedness, while original Denver property may have to be subjected to a different rate of taxation to meet original Denver indebtedness. Remote and improbable as such a contingency may be, nevertheless, if it should occur, all state laws, constitutional as well as statutory, would have to give way to the paramount rule that no state law can be suffered to impair the obligation of contracts. And thus the uniformity rule of taxation might be partially suspended in order to maintain contract obligations. But we need not for this reason hold section 10 of the Annexation Act void. The rule prescribed in that section may be followed, unless some creditor, for the purpose of enforcing the payment of his loan contracted in pursuance of an irrepealable ordinance, should invoke the rule specified in section 8 of article 11 of the constitution. In such case the municipal authorities of Denver might be compelled to act as officers of the original town of Valverde, or of the original city of Denver (as such <sup>120</sup> town or city existed when such loan was contracted), and in such official capacity might be required to levy and collect taxes from such original municipality, and apply the same to the payment of such loan; this section of article 11 being connected with the obligation of the loan would be held superior to section 8 of article 10, as well as superior to the annexation statute. Contract obligations are of paramount importance: 1 Dillon on Munic-

ipal Corporations, 4th ed., secs. 170-174; Cooley's Constitutional Limitations, 6th ed., 851; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *North Yarmouth v. Skillings*, 45 Me. 133; 71 Am. Dec. 530; *Blanchard v. Bissell*, 11 Ohio St. 96; *McGurn v. Board of Education*, 133 Ill. 122; *County of San Mateo v. Southern Pac. R. R. Co.*, 13 Fed. Rep. 722; *People v. Mayor of Chicago*, 51 Ill. 86; 2 Am. Rep. 278; *In re Town of Flatbush*, 60 N. Y. 406; *People v. Morgan*, 90 Ill. 566; *Meriwether v. Garrett*, 102 U. S. 473.

Of article 15, section 12: The Annexation Act is not obnoxious to this section. A legislative act whereby one municipal corporation becomes annexed to another, forming one consolidated town or city, the surviving municipality assuming all the corporate debts and taking all the corporate property of the annexed municipality, together with the authority to levy and collect taxes throughout the enlarged municipality, is not an act retrospective in its operation; nor does it impose on the people of either municipality a new liability in respect to transactions or considerations already past. The benefit accruing to the people of the surviving city is a present and prospective consideration, and is based upon a present and not upon a past transaction. So, too, there is a present consideration accruing to the people of the annexed territory; they receive and enjoy the greater privileges and protection which the larger municipality affords, and at the same time are relieved from the burdens of an independent municipal government.

It is said that the provisions of the Annexation Act are not binding upon the city of Denver, because the act does not provide for her assent to annexation either by popular election<sup>121</sup> or by a vote of her corporate officers. It is a sufficient answer for this case to say that the city of Denver is not here complaining; nor do we intimate that an objection on her part would be of any avail; besides, just before the passage of the Annexation Act, an act was passed "to amend and revise the charter of Denver." The latter act expressly provides that any town or city contiguous to Denver may become a part of the latter city by dissolution and annexation. It is conceded that such revised and amended charter has already been accepted and put in operation by the city of Denver. Thus, the city of Denver has accepted in advance the annexation of contiguous towns and cities with all the burdens

imposed by the Annexation Act: See Sess. Laws, 1893, particularly the exception and proviso in section 2, on page 135.

We have endeavored, with due consideration, to review the objections presented against the constitutionality of the Annexation Act. While impressed with the rule that the act should be upheld, if, by any reasonable construction, its provisions could be harmonized with the constitution, we have endeavored, also, to bear in mind the rights of individuals. It should, however, be observed in this connection that the record in this case nowhere discloses the existence of any municipal indebtedness whereby the rights of individuals, either as taxpayers or creditors, are, or may become, involved by annexation. We have, however, considered such questions because it seemed expedient that they should, to some extent, be disposed of in a proceeding of this kind. If the constitutional objections in respect to taxation and municipal indebtedness, as presented upon this review, were to be held sufficient to defeat the present act it is difficult to see how they could be obviated by any other legislative enactment. Thus, the unfortunate conclusion would be reached that two or more towns or cities in this state could not be annexed or consolidated, so long as there should be any indebtedness by loan existing against either of them.

The Annexation Act, so far as this review has extended, <sup>122</sup> appears to have been framed with care; and its provisions seem to be fair and just, as well as free from constitutional objection. The judgment of the county court will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

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**STATUTES VOID IN PART.**—The unconstitutionality of one portion of a statute cannot defeat other portions, unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute: *McPherson v. Blacker*, 92 Mich. 377; 31 Am. St. Rep. 587, and note, with the cases collected; but the invalidity of one provision in a statute the different parts of which must be construed together as dependent provisions, renders the whole act invalid: *Wadsworth v. Union Pac. Ry. Co.*, 18 Col. 600; 36 Am. St. Rep. 309, and note.

**MUNICIPAL CORPORATIONS—LEGISLATIVE CONTROL OVER.**—A municipal corporation has no vested right to any of its powers or franchises, but is subject to the control of the legislature, which may enlarge or diminish its territorial extent or its functions, and change or modify its internal arrangement, or destroy its very existence at discretion: *Coyle v. McIntire*, 7 Houst. 44; 40 Am. St. Rep. 109, and note, with the cases collected.

**MUNICIPAL CORPORATIONS—ANNEXATION—LEGISLATIVE POWER.**—The legislature has the power to restrain, modify, enlarge, or change public cor-

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 accident. The accident occurred  
 was no evidence to show that  
 occupied by him opposite the p  
 than his possession and use there  
 mission from any one to place  
 did. As stated by the plaintiff  
 with him, they were passing alo  
 single horse and buggy, and reac  
 dent about noon, the plaintiff d  
 rived by the village schoolhou  
 highway, all the children came o  
 a little fast, but was not scared  
 bridge or crosswalk; that the hor  
 boxes on the opposite side, mad  
 with the buggy out of the road, w  
 struck the crosswalk, throwing t  
 sustained very serious personal  
 in the opinion. The plaintiff's  
 testimony, to prove that the mo  
 placed in Jensen's yard as conv  
 the highway, was overruled, and  
 defendant. From a judgment  
 appealed.

*Raymond, Lamoreux, and Papp*

*Cate, Jones, and S*

JOHNSON v. CALNAN.  
887

10, 1887, empowering said Johnson to see fit, into lots, blocks, and streets, a tract of land, consisting of such county, and to file plats of the same the authentic plat of and all lots and parcels of land donors for all moneys received with the terms of a certain herewith, providing for the applic

EXHIBIT B.  
between the

**EXHIBIT B.**

**EXHIBIT B.**

between the same parties, dated [redacted] at [redacted], California, and applying to the same time, recites and provides as follows: That the parties of the first part have agreed by and through their respective attorneys (plaintiffs) parties of the first part have agreed by and through their respective attorneys (defendants) parties of the second part, William E. Johnson (defendant) that they do hereby agree to sell the property described in Exhibit A, except certain reservations, to the plaintiff, Johnson has agreed to resell the property to the plaintiff of such sale to the plaintiff for the sum of \$500.00.

Johnson has agreed to resell said land of such sale to the use of first 500 has been so applied, when all unsold is to become the property of and assigns forever.

Agreement witnesseth:  
 Johnson agrees

Johnson agrees (1) to plat said land for the same as rapidly as possible, but not later than the first of each month; (2) That upon the first of each month, he will divide the cash proceeds of such sale of lots from month to month, until the full sum of \$6,500 has been paid out to the parties of the first part as aforesaid. The lots to be conveyed by Johnson are to be conveyed by Johnson as follows: Lots six and seven, block A, and six, block H, to C. H. Leonard; lot one and two, block L, to J. H. Leonard, said lots to be conveyed to said parties, without consideration moving to said parties, said eight lots being reserved by first party and sale to second party. The full payment of \$6,500 by Johnson, for that portion of said forty acres of land that he and all deferred payments for lots or land taken in consideration of lots sold.

shall be and become the property of the second party, his heirs and assigns forever.

**EXHIBIT C.**

"This deed, made this sixth day of January, in the year of our Lord one thousand eight hundred and eighty-seven, between John Calnan, Johanna Calnan, Benjamin B. Hill, and Charles H. Leonard, all of the county of Garfield and state of Colorado, of the first part, and Wm. E. Johnson, trustee, of the county of Garfield and state of Colorado, of the second part.

"*Witnesseth*, That the said parties of the first part, for and in consideration of the sum of one dollar, to the said parties of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all the following described lot or parcel of land, situate, lying, and being in the county of Garfield and state of Colorado, to wit: The E.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 4 (plat No. 1), township 8 S., R. 88 W. of the 6th P. M., being twenty acres of land."

Judgment for plaintiffs. Defendant appealed.

*W. P. Hillhouse*, for the appellant.

*M. J. Bartley and E. T. Taylor*, for the appellees.

**175 ELLIOTT, J.** Two questions are presented by the assignments of error: Does the complaint state facts sufficient to entitle plaintiff to a reconveyance of the land as prayed for? Are the findings and decree sustained by competent and sufficient evidence?

Both questions must be answered in the affirmative, unless the statute of fraud and perjuries compels a different answer. Section 6 of the statute reads as follows:

"SEC. 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent, thereunto authorized by writing": Gen. Stats., sec. 1515; Mills' Ann. Stats., sec. 2019.

Under the foregoing statute it has been held that the existence of a direct or express trust in lands cannot be established <sup>176</sup> by parol evidence: *Von Trotha v. Bamberger*, 15 Col. 1. But where there is some written evidence showing the existence of a trust the door is thereby opened to the admission of parol evidence to show the truth of the transaction: *Hill on Trustees*, 61, 62; 2 *Sugden on Vendors*, 14th ed., 437; *Browne on Statute of Frauds*, 3d ed., sec. 111; 1 *Perry on Trusts*, sec. 78, et seq.; *Bohm v. Bohm*, 9 Col. 106.

By their special warranty deed of January 6, 1887, plaintiff conveyed the twenty-acre tract of land to defendant naming him "trustee" in the deed. Plaintiffs also produced further written evidence of the trust, as follows:

"FLORENCE, 3, 23, 1888.

"Received of Chas. B. Toll, Esq., one thousand dollars, check No. 2489, part payment on block B, Carbondale, Colo.

"WM. E. JOHNSON, Trustee."

On the offer of this receipt in evidence "it was conceded by defendant that he made a contract to sell a portion of the twenty-acre tract to Mr. Toll, and that said receipt was given on account thereof. It was further admitted that neither Mr. Toll nor the said contract had any connection with the Aspen and Western Railway Company." It was also "conceded by defendant that nothing has been done toward complying with the conditions of the alleged trust herein set up by the plaintiff."

In the case of *Von Trotha v. Bamberger*, 15 Col. 1, there was no written evidence to indicate that Bamberger held the title to the land in trust; nor was there any written evidence to show that Von Trotha ever had any valuable interest in the land, except by virtue of the verbal agreement under which she claimed. In the present case, it is conceded that plaintiffs were the owners in fee of the premises in controversy; they conveyed the same to defendant, naming him "trustee"; the conveyance was for the nominal sum of one dollar expressed in the deed; and no other consideration was given or received, unless the contract for the sale of the forty acres be regarded as a consideration for the conveyance of the twenty <sup>177</sup> acres also, on the theory that the contract of January 5th and the deed of January 6th constituted but one transaction. The contract and the deed do not refer to each other; each instrument is complete in itself; hence, *prima facie*, the ex-



execution of each instrument must be regarded as a separate transaction.

The word "trustee" inserted after the name of the grantee in the deed executed by plaintiffs, and also affixed by defendant to his signature to the receipt, would seem to indicate something more than a mere *descriptio personæ*; as a description of the person, the word thus used is too general to amount to any thing; as a description it does not identify any one. In our opinion, the word "trustee," under the circumstances, indicates the intention of the parties that the grantee was to take the title, not in his individual capacity, but in trust for another, though the name of his *cestui que trust* is not disclosed by the deed. In *Railroad Co. v. Durant*, 95 U. S. 576-579, where a certain person was designated as "trustee" in certain deeds "without setting forth for whom or for what purpose," it was held that "parol evidence was admissible to show these things." The authorities upon this point are not altogether clear or uniform; but we are of opinion that the *Durant* case announces a proper rule for the determination of the present controversy: *Shaw v. Spencer*, 100 Mass. 393; 97 Am. Dec. 107; 1 Am. Rep. 115; *Brown v. Combs*, 29 N. J. L. 36; *Selden's Appeal*, 31 Conn. 548; 2 Pomeroy's Equity Jurisprudence, secs. 1009, 1010.

In behalf of appellant it is contended that, in the absence of fraud, accident, or mistake, the recital in a deed of a valuable consideration and acknowledgment of its receipt cannot be contradicted by parol evidence for the purpose of destroying the operative words of the conveyance. Such is undoubtedly the rule as between the parties to the instrument: 2 Devlin on Deeds, sec. 834; *Coles v. Soulsby*, 21 Cal. 51. But in this case plaintiffs do not undertake to prove that their deed did not operate as a valid conveyance. They allege, as their evidence clearly tends to prove, that they conveyed, <sup>178</sup> and intended to convey, the premises to defendant as trustee, so that he might convey the premises, or such part thereof as might be necessary, to the railway company, provided the railway company should comply with certain conditions on its part to be performed, and that in default of such compliance the premises should be reconveyed to plaintiffs. The parol evidence produced by plaintiffs did not contradict nor tend to destroy the effect of the deed as a valid operative conveyance of the title for the purposes and uses thus intended. In this view, it is entirely immaterial that

defendant Johnson, by himself or by his attorney, actually paid to plaintiffs, or either of them, the one dollar consideration expressed in the deed.

As to the sufficiency of the evidence little need be said. The cause was tried, as it was triable, before the court without a jury. It was tried in open court on oral testimony, and upon certain instruments in writing admitted to be genuine. There was no material variance between the pleadings and the evidence produced on the part of plaintiffs. The evidence tended to prove all the substantial averments of the complaint.

Defendant's version of the oral agreement was to the effect that his title to the twenty acres was to be absolute, unconditional, and indefeasible; that the land was so conveyed to him that he might locate the terminal improvements of the railway thereon, and so enhance the value of lots in the forty-acre tract which he had just acquired by his contract with plaintiffs; and that plaintiffs had no other object or interest in the transaction than to get the six thousand five hundred dollars secured to them by the terms of such contract. If such was, in fact, the real transaction plaintiffs would have had no reason for insisting upon the insertion of the word "trustee" in the deed after defendant's name, nor is it reasonable that defendant would have accepted the deed in that form. He admits that he knew he was designated as trustee in the deed when he accepted it. Plaintiffs' account of the transaction is more reasonable from the fact that they had reserved <sup>179</sup> certain lots to themselves out of the forty-acre tract, and were interested in its prospective value; besides, they were residents of Carbondale, and were interested generally in the growth and prosperity of the town. But we need not further discuss the testimony or circumstances of the case. The parol evidence offered was competent under the issues, and clearly tended to support the claim made by plaintiffs. Its weight, as well as the credibility of the witnesses, was for the determination of the trial court. The findings and decree of the district court, requiring a reconveyance of the twenty-acre tract of land to plaintiffs, will be affirmed.

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**TRUSTS—EXPRESS—ESTABLISHMENT BY PAROL.**—A trust in land cannot be raised by parol: *Jackson v. Miller*, 6 Wend. 228; 21 Am. Dec. 316. An express trust in land can be created or declared by writing only: *Ratliff v. Ellis*, 2 Iowa, 59; 63 Am. Dec. 471, and note; *Irwin v. Ivers*, 7 Ind. 308; 63

Am. Dec. 420, and note; *Barr v. O'Donnell*, 76 Cal. 469; 9 Am. St. Rep. 242, and note; but under the Texas statute of frauds a trust in land may be created by parol: *James v. Fulcrod*, 5 Tex. 512; 55 Am. Dec. 743. A writing is not essential to the creation of a trust; but the statute of frauds requires that its terms be clearly manifested and proved in writing under the hand of the party to be charged: *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256. See, also, the extended note to *Jackson v. Cleveland*, 90 Am. Dec. 272.

**"TRUSTEE"—SIGNIFICANCE OF WORD AFTER SIGNATURE.**—Where a person signs a contract affixing to his name the word "agent," "trustee," or the like, he is *prima facie* individually liable. In order to show that he contracted in a representative capacity, he must prove the existence of that capacity: *Peterson v. Homan*, 44 Minn. 166; 20 Am. St. Rep. 564, and note. The addition of the word "trustee" to the name of a person is notice of a trust, and calls for inquiry and examination: *Marbury v. Ehlson*, 72 Md. 206; 20 Am. St. Rep. 467, and note. See, also, *Alger v. North End Sav. Bank*, 146 Mass. 418; 4 Am. St. Rep. 231.

## PHILLIPS v. CITY OF DENVER.

[19 COLORADO, 172.]

**MUNICIPAL CORPORATIONS CAN EXERCISE ONLY SUCH POWERS** as are granted by their charters or by general law, either expressly or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. They cannot, under a general grant of authority, adopt ordinances repugnant to the policy of the state as declared in its legislation.

**MUNICIPAL CORPORATIONS.—MUNICIPAL ORDINANCES** expressly authorized by specific and definite legislative authority are upheld, unless in conflict with the constitution. Ordinances which municipalities assume to pass by virtue of their incidental powers, or under a general grant of authority, must be declared invalid, unless they are reasonable, fair, and impartial, and not arbitrary or oppressive.

**MUNICIPAL CORPORATIONS.—A GRANT OF POWER** to a municipality to regulate lawful occupations and business places is not an express grant of power to locate or prescribe the limits of carrying on lawful occupations upon private premises. Nor does a grant of power to regulate and prevent the carrying on of business dangerous or detrimental to public health, and to declare, prevent, or abate nuisances, vest in the city council authority to prohibit at their discretion well constructed, regulated, and conducted occupations, such as livery-stables; nor does a general welfare clause in a grant of power confer full and specific power upon the city council for such purpose.

**NUISANCES.—LIVERY-STABLES** in municipalities are not *per se* nuisances. They may become such if not constructed and used in a proper manner.

**MUNICIPAL CORPORATIONS.—UNREASONABLE ORDINANCE.**—An ordinance prohibiting the location of a livery-stable in any city block in which a school-building is situated, or in any block opposite to a block in

which a school-building is situated without regard to the manner in which such stable is constructed, kept, or used, and without specifying the distance from a school-building within which a livery-stable may be conducted, is unreasonable and void, and cannot be considered as valid under a general or incidental grant of power to the municipality assuming to enact it.

**MUNICIPAL CORPORATIONS.** — **PROHIBITIVE ORDINANCES** not criminal, but highly penal in their nature, are invalid, unless free from legal and constitutional objection, and cannot be permitted to prejudice the rights and privileges of the citizen in respect to the use and enjoyment of his private property.

*C. M. Campbell*, for the appellant.

*J. F. Shafroth, A. B. Seaman, and G. W. Whitford*, for the appellee.

<sup>123</sup> **ELLIOTT, J.** The assignments of error challenge the validity of the ordinance under which defendant was convicted.

Among other things the ordinance provides that no livery-stable, or stable for the boarding of horses, shall be erected, established, or carried on in any block in this city (unless the same shall be in operation at the date of the passage of the ordinance), without a permit from the city council; and that no permit shall be issued for any livery-stable in any block in which a school-building is situated, or in any block opposite to a block in which a school-building is situated.

It is conceded that defendant occupied, conducted, and was engaged in running a livery-stable for the boarding of horses within the limits prohibited by the ordinance at the time of and prior to the commencement of this action; and that the stable was erected and put in operation after the adoption of the ordinance, February 18, 1888.

1. In the case of *City of Durango v. Reinsberg*, 16 Col. 827, this court declared the law as follows in respect to the powers of municipal corporations: "A municipal corporation can exercise only such powers as are granted to it by its charter or by the general law of the state, either in express words or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation. A municipal corporation, under a general grant of authority, cannot adopt ordinances which <sup>123</sup> infringe the spirit or are repugnant to the policy of the state as declared in its legislation."

2. In determining whether a municipal ordinance is valid the following distinction is to be observed: An ordinance

expressly authorized by specific and definite legislative authority will be upheld, unless it conflicts with the constitution of the state or nation, while an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair, and impartial, and not arbitrary or oppressive: 1 Dillon on Municipal Corporations, 4th ed., secs. 319-322; also sec. 327, et seq.; *Tugman v. City of Chicago*, 78 Ill. 405; *May v. People*, 1 Col. App. 157.

The following provisions of the charter of the city of Denver were in force at the time of the adoption of the ordinance in question, and they are now relied on to sustain its validity:

"SEC. 20. The city council shall have power by ordinance:

"*Eleventh.* Exclusively to license, regulate, and tax any or all lawful occupations, business places, amusements, places of amusement, and may fix the rate of charges for the carriage of persons and property within the city, by licensed hackmen, omnibus-men, carriage-men, draymen, and expressmen.

"*Fifty-eighth.* To regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the manufacture or vending of articles obnoxious to the health of the inhabitants; and to declare, prevent, or abate nuisances on public or private property and the cause thereof": See Sess. Laws 1885, pp. 81, 82, 87.

The following provision of the charter was passed after the adoption of the ordinance in question: "The city council shall have the power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, and to make all ordinances which it may deem necessary or requisite for the good order, health, good government, and general welfare of the city": See Sess. Laws 1889, p. 129, amendment to sec. 21 of the charter of 1885.

By virtue of the foregoing provisions it is contended that <sup>184</sup> the city council were authorized to control absolutely the location and carrying on of livery-stables within the limits of the city; that, by virtue of the power to regulate and prevent, they might prescribe the limits for such stables, at their discretion, and prohibit their being conducted elsewhere; and that they might declare and abate livery-stables as nuisances, if carried on within such interdicted limits, or visit upon the proprietors such penalties as would compel them to yield

obedience to any ordinance the council might deem proper to enact upon such subject.

In our opinion the charter provisions above quoted will not bear the construction contended for. The power conferred is not sufficiently specific or definite to warrant such unrestrained municipal legislation affecting private property. The grant of power to regulate lawful occupations and business places is certainly not an express grant of power to locate or prescribe the limits of carrying on lawful occupations upon private premises. The grant of power to regulate and prevent the carrying on of business dangerous or detrimental to public health, and to declare, prevent, or abate nuisances, is not to be construed as vesting the city council with authority to prohibit, at their discretion, the existence of well-constructed, well-regulated, and well-conducted livery-stables; neither does the "general welfare" clause, adopted after the passage of the ordinance in question, confer full and specific power upon the city council for that purpose. The ordinance in question must, therefore, be subjected to the test of reasonableness; and the particular provision under consideration cannot stand, in any event, unless its adoption was a reasonable exercise of the incidental or general grants of power contained in the charter. Whether the city government can be vested with such authority as is contended for need not now be considered: *Everett v. City of Council Bluffs*, 46 Iowa, 66.

3. A livery-stable in a town or city is not *per se* a nuisance, though it may become a nuisance if not constructed, kept, and used in a proper manner: *Flint v. Russell*, 5 Dill. 151; *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45.

<sup>185</sup> The ordinance in question is not directed against livery-stables improperly kept or used, but against all livery-stables within the prescribed limits. There is nothing to indicate that there was any thing improper in the construction, keeping, or use of defendant's stable. The sole contention on the part of the city, therefore, is confined to the single fact that defendant had located and conducted his stable within the limits prohibited by the ordinance—that is, in a block opposite to a block in which a school-building was situated. The ordinance, however, does not undertake to declare that a livery-stable conducted within the interdicted limits shall be deemed a nuisance *per se*; nor do we intimate that such an ordinance would have been valid if passed: *City of Denver v.*

*Mullen*, 7 Col. 345; *State v. Mott*, 61 Md. 297; 48 Am. Rep. 105.

4. It is true there was testimony showing that defendant occupied and carried on a livery-stable within five hundred feet of a school-building, and, also, that said livery-stable was in a block opposite to a block in which a school-building was situated. But the ordinance does not provide that livery-stables shall not be located or conducted within five hundred feet of any school-building, nor is any other distance prescribed. The five hundred feet limit applies only to candle factories, rendering establishments, and soap factories. In respect to livery-stables, the language is, "that no permit shall be issued . . . for any livery-stable in any block in which a school-building is situated, or in any block which is opposite to a block in which a school-building is situated."

The record in this cause does not show the size or dimensions of blocks in the city of Denver, nor does it show that the blocks are of uniform dimensions. There is, therefore, no definite distance from school-buildings within which the construction and carrying on of livery-stables are prohibited by the ordinance.

For illustration: Suppose the city is laid out into blocks of uniform dimensions intersected by streets and alleys at right angles. In such case, if a school-building were located on an interior block, livery-stables would, by the ordinance, <sup>186</sup> be excluded from five blocks; and if the blocks were four hundred feet in length by two hundred and sixty-six feet in width, and the streets eighty feet wide, a school-building might be so situated as to exclude the location of a livery-stable nearly a thousand feet distant from it—that is, the diagonal length of two blocks and the width of the intervening street. On the other hand, a stable might be located only a little more than one hundred feet from a school-building—that is, on the corner diagonally across from it, and yet not be in the same block, nor in any block directly opposite thereto; more than this, the stable located at the greater distance would face from, and be out of sight of, the school-building, while the nearer stable would be in full view of it; and yet the location of the farther stable would be contrary to the ordinance, while the nearer stable would not be. If it be considered that the ordinance applies to blocks diagonally opposite to a school-building its operation is, in some respects, still more objectionable; for, in such case, livery-stables



would be excluded from nine blocks for every school-building situated in the interior of the city.

Even the foregoing illustration does not fully show the unreasonableness of the ordinance in question. There is nothing in the record to show that the blocks of the city are of uniform size; some may be larger than above supposed, and some may be twice or three times as large; as in case where the usual intersecting street or streets have not been cut through. An ordinance so uncertain, so indefinite, so unsuitable and unsatisfactory to accomplish the desired object, cannot be regarded as reasonable; and so cannot be upheld under the authority supposed to be granted by the city charter.

Ordinances of the kind in question, though not strictly criminal, are highly penal, and cannot, unless free from legal and constitutional objection, be permitted to prejudice the rights and privileges of the citizen in respect to the use and enjoyment of his private property.

The judgment of the county court is reversed and the cause remanded.

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**MUNICIPAL CORPORATIONS—POWERS OF.**—A municipal corporation has only such powers as have been expressly delegated to it and their appropriate incidents: *Wilson v. Boyers*, 5 Wash. 303; 24 Am. St. Rep. 858, and note; *South Covington etc. Ry. Co. v. Berry*, 93 Ky. 43; 40 Am. St. Rep. 161, and note; *Coyle v. McIntire*, 7 Houst. 44; 40 Am. St. Rep. 109, and note. See, also, the note to *State v. Robertson*, 40 Am. St. Rep. 276.

**NUISANCE.**—A LIVERY-STABLE IN A CITY has been held not to be a nuisance: *Shiras v. Olinger*, 50 Iowa, 571; 32 Am. Rep. 138, and note. A private stable in a city is not necessarily a nuisance: *Rounsaville v. Kohlheim*, 68 Ga. 668; 45 Am. Rep. 505. A stable is not a nuisance *per se*: *Keiser v. Lovett*, 85 Ind. 240; 44 Am. Rep. 10; *Kirkman v. Handy*, 11 Humph. 406; 54 Am. Dec. 45; *St. James Church v. Arrington*, 36 Ala. 546; 76 Am. Dec. 332.

**MUNICIPAL CORPORATIONS.—REGULATION OF BUSINESS:** See *City of Richmond v. Dudley*, 129 Ind. 112; 28 Am. St. Rep. 180, and note; *State v. Tenant*, 110 N. C. 609; 28 Am. St. Rep. 715, and note; *Town Council v. Pressley*, 33 S. C. 56; 26 Am. St. Rep. 659, and note; also the note to *Ex parte Byrd*, 5 Am. St. Rep. 331.

**TRIMBLE v. PEOPLE.**

[19 COLORADO, 137.]

**JURISDICTION OF SUPREME COURT.**—Whenever a constitutional question is necessarily to be determined an appeal or writ of error can be taken from the final judgment of the trial court to the supreme court, but the constitutional question invoked to give the latter court jurisdiction must be fairly debatable, and not based on mere assertion.

**OF SUPREME COURT JURISDICTION.**—Whenever the construction of a constitutional question, state or national, is properly before the supreme court, and necessary to the determination of the case, that court has entire jurisdiction, not only of such question but of all other matters necessary to a complete determination of the controversy.

**PUBLIC OFFICERS—CREATION OF OFFICE AND REMOVAL THEREFROM.**—When an office is created by statute and the manner of filling it and the mode of removal are also provided by statute, the question of removal therefrom and the causes therefor are not affected by a constitutional provision relating to removals from office.

**PUBLIC OFFICE AND OFFICERS—POWER OF GOVERNOR TO REMOVE OFFICER.**—When a statute creating an office also provides that the governor may remove the incumbent therefrom for cause, provided the removal is not made for political reasons, and the cause of removal is stated in writing, the governor may remove such officer for any cause other than political. Of the sufficiency of the cause he is the sole judge.

**PUBLIC OFFICE AND OFFICERS—LEGISLATIVE POWER TO CREATE, FILL, AND REMOVE FROM OFFICE.**—The legislature, having the power to provide for the creation of a public office, has power to declare the manner in which such office shall be filled, and also to provide for removals therefrom.

**OFFICE AND OFFICERS—POWER OF GOVERNOR TO REMOVE OFFICER.**—When a statute creating a public municipal office invests the governor with power to remove the incumbent therefrom for cause, without restriction except that the removal must not be made for political reasons, and that the cause therefor must be stated in writing, the governor is not required, as a prerequisite to removal, for any other cause, to institute an investigation in the nature of a judicial or quasi judicial inquiry. The cause sufficient to warrant removal is to be determined solely by the governor. No mode of inquiry being prescribed, he is at liberty to adopt such mode as to him shall seem proper, without interference from the courts. Hence, his refusal to hear counsel is not fatal to his action, because he may proceed *ex parte* if he so desires.

**ACTION for usurpation of office.** Phelps, while holding the office of police commissioner of the city of Denver, was removed therefrom by the governor for neglect of duty. Trimble was then appointed to fill the vacancy caused by the removal of Phelps. The latter brought this action for usurpation of the office, and recovered judgment in the district court. Trimble appealed.

*O'Neill and Park and P. Rogers, for the appellant.*

*W. F. Rogers, I. G. Barlow, and Rogers and Stair, for the respondent.*

<sup>191</sup> HAYT, C. J. It is suggested by counsel that this court is without authority to review the judgment of the district court in this proceeding. It is conceded that if this court has jurisdiction, since the enactment of the statute creating the court of appeals, it is by virtue of the proviso in the first section of the act creating that court, by which the jurisdiction of this court is retained where the construction of a provision of the constitution of the state, or of the United States, is necessary to the determination of a case.

The object of providing for the jurisdiction of this court in all cases where constitutional questions are involved is that questions of such grave importance, affecting the organic law of the state, and the power of the legislative, executive, and judicial departments, should be determined by the highest court in the state. In several states intermediate courts of <sup>192</sup> review have been created, but the provisions fixing the jurisdiction of such courts are far from uniform. The section in force in this state does not appear to have been copied, even in substance, from the laws of any other state. It has the merit of being couched in as direct and positive language as could well have been employed.

Under the proviso, whenever a constitutional question is necessarily to be determined in the adjudication of a case, an appeal or writ of error will lie from the final judgment to this court. It matters but little how such question is raised, whether by the pleadings, by objections to evidence, or by argument of counsel, provided the question is by some means fairly brought into the record by a party entitled to raise it. It is obvious, however, that some limitation must be placed upon the foregoing provisos, otherwise every case might be brought into this court and thereby the power and usefulness of the court of appeals destroyed. It is clear that mere assertion that a constitutional question is involved will not be sufficient to give jurisdiction. It must fairly appear from an examination of the record that the decision of such question is necessary, and also that the question raised is fairly debatable. Our attention has been called to a number of cases in which this question has been raised under statutes, which although dissimilar from the one in force in this state,

the decisions are valuable as authorities in support of the conclusion that the constitutional question invoked to give the court jurisdiction must be fairly debatable, and not based on mere assertion. To this extent, at least, the authorities are uniform: See Elliott's Appellate Procedure, sec. 38; *City of Cairo v. Bross*, 99 Ill. 521; *Chaplin v. Commissioners of Highways*, 126 Ill. 264; *Benson v. Christian*, 129 Ind. 535; *Williams v. Louisiana*, 103 U. S. 637.

The statute creating the court of appeals has been in force in this state but a short time, and it is obvious that the practice under it can only be developed and become settled as the result of experience and judicial decision from time to time as questions shall be presented. We shall not undertake to determine <sup>193</sup> in this case, nor is it necessary to determine, whether or not constitutional questions which have once been determined by this court can thereafter be considered open to controversy, to the extent of furnishing ground for jurisdiction in subsequent cases in this court.

Under the foregoing provision, whenever the construction of a constitutional provision, state or national, is necessary to a determination of a case, the court has entire jurisdiction of the case, not only of the constitutional question, but of all other matters necessary to a complete determination of the controversy. The same result would necessarily follow from the well-established rule that the incidents of a class of cases follow the class. This rule is now universally recognized. Any other would distribute the cases by piecemeal between the two courts of review, involving our litigation in hopeless and inextricable confusion: Elliott's Appellate Procedure, sec. 36; *Smith v. Newbern*, 70 N. C. 14; 16 Am. Rep. 766; *Cook County v. McCrea*, 93 Ill. 236.

In this case a constitutional question was raised in the court below by defendant in error, and as we shall presently show, such question was erroneously determined in his favor. Still other constitutional questions were raised in that court. The determination of these questions was found necessary by the district court in deciding the case. They have been fully argued in this court, and must necessarily be construed upon this review. The jurisdiction of this court must, therefore, be taken as established.

The underlying error that entered into the decision of the district court is upon the construction of section 6 of article 4 of the constitution. This provides that the governor "may

remove any such officer for incompetency, neglect of duty, or malfeasance in office." The court assumed that the authority for the removal of relator rested upon this constitutional provision. It was construed as a limitation upon the exercise of the power of removal from office, and to deprive the governor of the right of removal unless there existed one of the three specified reasons mentioned therein. The <sup>184</sup> court further held that whether such reason existed in a particular case must be determined upon an investigation, in its character judicial, before the governor was authorized to act.

An analysis of the constitutional provision, however, shows that the officers therein referred to are: 1. Those whose offices are established by the constitution; 2. Those whose offices are created by law, the appointment or election to which is not otherwise provided for. The relator's office does not fall under either class mentioned, for while it is true that his office was created by law, his appointment is also provided for by statute, and the same statute provides that such appointment shall be made with power of suspension or removal by the governor at any time, for cause to be stated in writing, but not for political reasons. The office being one of statutory creation, the manner of filling it, and the mode of removal and filling of vacancies being also provided by statute, the case falls clearly outside of those offices to which the constitutional provision relates. *People v. Osborne*, 7 Col. 605; *Brown v. People*, 11 Col. 109.

In this connection we may consider section 1 of article 12 and section 3 of article 13 of the constitution. The argument based upon these provisions is to the effect that before an officer not liable to impeachment can be removed the procedure leading up to a judgment or removal must be prescribed by an act of the legislature. These two provisions, singly or together, do not warrant this deduction. The first in the order in which they appear in the constitution provides only that, "Every person holding any civil office under the state, or any municipality therein, shall, unless removed according to law, exercise the duties of such office." The words "according to law" in this section can have no other construction than that such officers shall be removed as provided by the constitution or statute law. And the same is equally true of section 3 of article 13, providing that certain officers shall be liable to removal for misconduct or malfeasance in office in such manner as may be provided by law. There is certainly

nothing in these provisions prohibiting the <sup>195</sup> legislature from authorizing the summary removal of the relator in this case, and if removed in accordance with a constitutional statute he was removed "according to law."

It is claimed that the provision in reference to removals by the governor applies only to appointees made by that officer to fill vacancies caused by resignation, death, or otherwise of the appointees confirmed by the senate, and that as to those appointments made by the governor and confirmed by the senate, the governor alone has no power of removal. In support of this claim the following cases are cited: *People v. Cazneau*, 20 Cal. 504; *People v. Freese*, 76 Cal. 633; *People v. Freese*, 83 Cal. 453. These decisions were based upon the statutes of California, providing that certain officers appointed by the governor, with the advice and consent of the senate, could only be removed by the governor with the concurrence of the senate. The power of the legislature to invest the governor alone with authority to remove being expressly recognized, as appears from the following extract from the opinion written by Chief Justice Field in *People v. Cazneau*, 20 Cal. 504: "The office was created by law and the mode in which the office and vacancies therein should be filled was matter purely of legislative discretion."

Our statute furnishes a conclusive answer to this argument of counsel. Section 45 of the charter, after providing for the appointment of the fire, police, and excise commissioners by the governor, by and with the advice and consent of the senate, further provides that the governor may, in vacation of the senate, fill vacancies by appointment in writing filed with the secretary of state, and all appointments by the governor shall be made with power of suspension or removal at any time for cause, etc. Such broad and sweeping language as this is certainly sufficient to include all the appointments provided for in said section, whether made with the advice and consent of the senate, or to fill vacancies during vacation of the senate; and to undertake to restrict the power of the governor, as urged by counsel, would be a perversion of the letter and spirit of the act.

<sup>196</sup> Authorities are cited, although not seriously relied upon, to show that an office is property, and that the possessor has a vested right therein. This, however, grows out of the common-law rule regarding an office as a hereditament. It can have no foundation in a republic like ours. "Public

offices," says Ruggles, C. J., in *Connor v. New York*, 5 N. Y. 285, "are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken, and may, at any time, be resigned. They are created for the benefit of the public, and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office-holder": See also *Meehem on Public Officers*, secs. 464, 465.

The statute only requires that the reason for removal shall be other than political, and that it shall be stated in writing. The words "but not for political reasons" are words of limitation, and could have been deemed necessary by the legislature for but one reason, to wit: that otherwise the governor might remove for political purposes. The intent on the part of the legislature to confer the power of removal for any other cause satisfactory to the governor is made plain by the words of limitation. Was the action taken by the governor authorized by the statute? By it the governor is given full power over the removal of the officers named, subject to the specified restrictions. It is a familiar principle, subject to general application, except as otherwise limited by the constitution, that municipal corporations are creatures of the statute, and that the legislative power over the same is plenary. The legislature had the power to provide for the creation of a police commissioner for the city of Denver; it had the power to provide the manner in which such office should be filled, and there can be no doubt that it had like power to provide for removals.

In the same section in which the authority is conferred upon the governor to remove certain officers for cause, like <sup>1897</sup> authority is conferred upon the mayor to remove officers appointed by him. It is to be observed that the language of the statute is substantially the same in both instances. The legislature, in dealing with these officers, was dealing with the chief executive officer of the state, and with the chief executive officer of the city of Denver. It certainly understood that in administering the affairs of the state in the one instance, and the affairs of the city of Denver in the other, these administrative officers would be likely to be called upon to act in a summary manner with their subordinates in certain contingencies, and the fact, if it be a fact, that the gov-



ernor acted in this case without sufficient reflection, is a weak argument against the investiture of the power of removal in the executive of officers appointed by him. Experience has demonstrated that the power of removal must be lodged somewhere; and the fact that the power exists, and may be exercised as occasion requires, carries with it the possibility that the power may not always be wisely used. But if this is to be taken as a conclusive argument against the power, it applies as well to all investiture of authority, and would overthrow government itself.

Whatever may be the rule as to those officers, the removal of whom for certain specified causes is provided by other statutes or by the constitution, the governor, under the statute before us, is not required, as a prerequisite to removal, to institute an investigation in the nature of a judicial or *quasi* judicial inquiry. The investiture of the power of removal here given is restricted in but two particulars; it must not be exercised for political reasons, and the cause of removal must be stated in writing. In considering removals under this act we must assume that the law-making body was of the opinion that the requirement that the cause of removal should be stated in writing was the only check necessary to prevent an arbitrary and oppressive abuse of the power.

If removals were only authorized for certain specified reasons a question of procedure might have been presented more difficult of solution. In this instance the cause stated does <sup>198</sup> not import any wrongdoing to the officer, and, while it may not be such as would have had weight with a court, it was deemed sufficient by the governor, and his judgment is final and decisive. The office of police commissioner is created by the statute; it was accepted by the relator under the conditions imposed by the act, among which was that the incumbent should hold it subject to removal by the governor for cause.

Under the statute the cause that may be sufficient to warrant removal is to be determined by the governor, and, no mode of inquiry being prescribed, he is at liberty to adopt such mode as to him shall seem proper, without interference on the part of the courts. The governor was not bound to examine witnesses under oath, or otherwise, although it was eminently proper that he should do so. He might have resorted to other means for ascertaining whether a cause of removal existed; and the refusal to allow counsel is not a

fatal objection to the governor's action, as he might have proceeded *ex parte*.

The governor having determined that a sufficient cause for removal existed, and having exercised the power confided to him, relator is without remedy in this proceeding. It is the duty of the courts to uphold the executive power as it has been conferred by the legislature.

The foregoing conclusions find support in the following decisions in addition to those already cited: *Keenan v. Perry*, 24 Tex. 253; *Wilcox v. People*, 90 Ill. 186; *People v. Higgins*, 15 Ill. 110; *State v. Doherty*, 25 La. Ann. 119; 13 Am. Rep. 131; *State v. Hawkins*, 44 Ohio St. 98; *Mayor of Hoboken v. Gear*, 27 N. J. L. 265; *People v. Whitlock*, 92 N. Y. 191; *State v. McGarry*, 21 Wis. 496.

The judgment of the district court will be reversed and the cause remanded, with direction that judgment be entered for plaintiff in error.

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**OFFICERS.—POWER TO REMOVE:** See *People v. Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644, and note, with the cases collected. The principal case, in so far as it affirms that a removal from office "for cause," may be *ex parte* and without any opportunity to the accused to show that no cause for such removal exists, we think is against authority as well as in conflict with reason: See note to *Wulzen v. Supervisors*, 40 Am. St. Rep. 45.

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## WILSON v. PEOPLE.

[19 COLORADO, 199.]

**PUBLIC OFFICERS, LIABILITY FOR SAFEKEEPING OF MONEY.**—A public officer receiving money by virtue of his office is a bailee. The extent of his liability is that imposed by law. When unaffected by constitutional or legislative provisions his duty and liability are measured by the law of bailment.

**PUBLIC OFFICERS—OFFICIAL BOND—OFFICE OF.**—The official bond given by a public officer does not extend his legal liability. Its office is to secure the faithful and prompt performance of his duties.

**PUBLIC OFFICERS—LIABILITY FOR SAFEKEEPING OF MONEY.**—A clerk of a court who receives money by virtue of his office, and deposits it in a bank of reputed solvency, and in doing so acts as prudent men ordinarily do with their own funds, is not liable for the subsequent loss of the money through the failure of such bank. Nor are his sureties on his official bond liable in such case.

**ACTION** against an officer and his bondsmen to recover money. John Wilson, while acting as clerk of the district court of Fremont county, Colorado, received the money in

suit, and deposited it to his credit as such clerk in the Exchange Bank of Cañon City, Colorado, reputed at that time to be solvent. While the money was thus on deposit the bank failed in business, and proved unable to pay its depositors any part of their deposits. Hence this action. Judgment for the plaintiffs; defendants appealed.

*Macon and Macon and D. P. Wilson, for the appellants.*

*C. E. Gast, for the appellees.*

201 GODDARD, J. From the agreed facts it appears that the money was lost through no fault of the clerk. He deposited the money in a bank of reputed solvency, as clerk of the court, and in doing so acted as prudent men ordinarily do with their own funds. The judgment of the court below must, therefore, be upheld, if at all, upon the principle that the conditions of his official bond imposed upon him an absolute obligation to pay the money when required, and that no exercise of diligence on his part will exonerate him from such obligation. Such is the contention of counsel for appellee, and for its support he relies on the case of *United States v. Prescott*, 3 How. 578, decided by the supreme court of the United States in 1845 as the leading case, and several other cases in that court, 202 as well as some decisions by state courts, which approve and follow the doctrine therein announced.

In these cases in which the rule contended for was sustained the court had under consideration the liability imposed by the official bond of receivers of public money, and the conclusions arrived at were influenced largely by considerations of public policy. Whether the case at bar is sufficiently analogous to these cases to bring it within the rule therein announced it is unnecessary to decide, since the supreme court of the United States in a later case has very much modified, if it has not in effect overruled, the extreme doctrine laid down in its earlier decisions. In the case of *United States v. Thomas*, 15 Wall. 337, Justice Bradley, in speaking of the leading case of *United States v. Prescott*, 3 How. 578, said:

"After reciting the condition of the bond the court adds, with a greater degree of generality, we think, than the case before it required: 'The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.' This broad language would seem to indi-

cate an opinion that the bond made the receiver and his sureties liable at all events. . . . And as the money in the hands of a receiver is not his; as he is only custodian of it; it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law."

And, after reviewing the principal cases relied on by appellee, he further said:

"So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially <sup>203</sup> of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case. . . .

"The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes."

While the majority opinion distinguished the case under consideration from those preceding it we think the reasoning of the learned justice who wrote the opinion logically and necessarily overrules the doctrine laid down in the former cases. If, as therein announced, the obligation imposed by the bond is absolute, and the officer was an insurer of the money received by him, how could the manner or cause of its loss affect his liability? Wherein is he more at fault when overpowered by one or two robbers than he is when

between the plaintiff company and said town of Highlands is immaterial in this action. The passage of the proposed ordinance being within the scope of the legislative power conferred upon the mayor and trustees, the granting of the injunction was an erroneous interference with their legislative functions. As was said by Mr. Justice Field in *Alpers v. San Francisco*, 82 Fed. Rep. 506: "Municipal corporations are instrumentalities of the state for the more convenient administration of local affairs, and for that purpose are invested with <sup>241</sup> certain legislative power. In the exercise of that power, upon the subjects submitted to their jurisdiction, they are as much beyond judicial interference as the legislature of the state. The courts cannot in the one case forbid the passage of a law, nor in the other the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the state, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary."

There seems to be some diversity of opinion upon this subject; or, as we have intimated, there may be exceptions to the doctrine of noninterference. For example: If it should be made to appear that the legislative body of a municipality was about to pass some ordinance, resolution, or order, and that its mere passage would immediately occasion, or be immediately followed by, some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings; a court of equity might perhaps extend its strong arm to prevent such loss or injury. This view was indicated by judges Sawyer and Hoffman in *Spring Valley Water Works v. Bartlett*, 16 Fed. Rep. 615. So in *Davis v. Mayor of New York*, 1 Duer, 498, Mr. Justice Duer, speaking upon this subject, said: "A court of equity will not interfere to control the exercise of a discretionary power, when the discretion is legally and honestly exercised—and it has no reason to believe the fact is otherwise—but will interfere whenever it has grounds

for believing that its interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud. It will interfere, <sup>242</sup> and it is bound to interfere, whenever it has reason to believe that those in whom the discretion is vested are prepared illegally, wantonly, or corruptly, to trample upon rights, and sacrifice interests which they are specially bound to watch over and protect." This case was subsequently affirmed by the New York court of appeals in 14 N. Y. 506; 67 Am. Dec. 186.

It is an exceedingly delicate matter for the courts to interfere by injunction with the action, or contemplated action, of a legislative body in any case; and such interference cannot be justified except, perhaps, in extreme cases and under extraordinary circumstances. No ground for such interference is presented in the present case; and, as the members of the municipal board are the only defendants, no relief can be granted in this action. Entertaining these views it would be manifestly inconsistent, as well as improper, to intimate any opinion as to the validity of plaintiff's claim to the exclusive right to construct and operate water-works for supplying the town of Highlands and its inhabitants with water. The judgment of the district court is reversed, and the cause remanded, with directions to dismiss the action.

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**MUNICIPAL CORPORATIONS—JUDICIAL CONTROL OVER LEGISLATION OF.**—The discretion of municipal corporations within the sphere of their powers is not subject to judicial control except in cases where fraud is shown, or where the power or discretion is being grossly abused to the oppression of the citizen: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214, and note.

**MUNICIPAL CORPORATION—BINDING EFFECT OF ORDINANCES.**—The ordinances of a municipal corporation have, when valid, as binding an effect on the members thereof as if they were statutes enacted by the state legislature: *Milne v. Davidson*, 5 Mart., N. S., 409; 16 Am. Dec. 189, and extended note.

**AN INJUNCTION TO RESTRAIN THE PASSAGE OF A MUNICIPAL ORDINANCE** will not be granted: *Harrison v. New Orleans*, 33 La. Ann. 222; 39 Am. Rep. 272; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; 24 Am. Rep. 756. But a court of equity will not refuse to interfere by injunction to restrain a city from unlawfully attempting by ordinance to destroy the valuable franchise of a railroad company merely because the ordinance is of a quasi criminal character: *Mobile v. Louisville etc. R. R. Co.*, 84 Ala. 115; 5 Am. St. Rep. 342. See, also, the note to *Howell v. Tacoma*, 28 Am. St. Rep. 87.

## DILL v. PEOPLE.

[19 COLORADO, 469.]

**CRIMINAL PLEADING—VARIANCE.**—In criminal pleadings the time at which an offense is charged to have been committed is not material, unless time is of the essence or gist thereof.

**PERJURY—VARIANCE.**—When an indictment for perjury is based upon a written instrument set out therein in *hæc verba*, and the instrument offered in evidence bears a different date from the one set out, the variance is material as to matter of description, and a conviction on such evidence cannot be sustained.

**CRIMINAL PLEADING.**—A PLEA OF *AUTREFOIS ACQUIT* IS NOT SUFFICIENT in law if the matter set out in the second indictment is not admissible under the first, and a conviction cannot be properly sustained on such evidence.

**WITNESSES—HUSBAND AND WIFE.**—A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted.

**WITNESSES—HUSBAND AND WIFE.**—A wife is competent to testify against her husband on trial for perjury in making a false affidavit in his suit for divorce against her.

*H. W. Spangler and L. K. Pratt, for the appellant.*

*Eugene Engley, attorney general, and H. T. Sale, for the people.*

470 **ELLIOTT, J.** 1. The sustaining of the demurrer to defendant's plea of *autrefois acquit* is assigned for error.

It appears that in November, 1890, Sanford B. Dill instituted an action in the county court of Arapahoe county to procure a divorce from his wife. In such action defendant made and filed an affidavit as follows:

"STATE OF COLORADO, }  
County of Arapahoe. } ss.

*In the County Court thereof.*

*Sanford B. Dill, Plaintiff, }*

v.  
*Susan A. Dill, Defendant. }*

## AFFIDAVIT.

"Sanford B. Dill, being duly sworn, says that he is the plaintiff in the above-entitled action, and that he has filed in 471 said action a complaint against Susan A. Dill, the defendant, to procure a divorce:

"That the defendant (meaning the said Susan A. Dill) does not reside in the state of Colorado, and her postoffice address is unknown to this affiant.



"SANFORD B. DILL, Plaintiff.

"Subscribed and sworn to before me, this 29th day of November, 1890. My commission expires Sept. 20, 1894.

[SEAL] "E. E. SCHLOSSER, Notary Public."

The indictment upon which Dill was convicted sets out the foregoing affidavit *in hæc verba*, and charges, among other things, that defendant committed willful and corrupt perjury in making oath thereto, in that he did then and there know the postoffice address of his said wife Susan A. Dill.

To this indictment defendant interposed a plea of *autrefois acquit*. The plea alleged, *inter alia*, that at a former term of the same court defendant had been indicted and tried upon another indictment for the same crime of perjury, and that upon such trial he was acquitted. But the record of the first cause, which is made a part of the plea, shows further that in the first indictment the affidavit was also set out *in hæc verba* in the first count and that the date was stated as the "28th day of November, 1890," instead of the "29th day of November, 1890." The prosecution being required on the first trial, upon defendant's motion, to elect upon which count the trial should proceed, elected to proceed upon the first count. The record further shows that in the midst of the trial, "it appearing to the court that there is a variance between the proof offered and the allegations of this said indictment, and the said jurors being duly instructed by the court, without retiring from their seats, upon their oaths do say: 'We, the jury, find the defendant not guilty as charged in the first count of this indictment.'"

The demurrer was an admission of all the material facts well stated in the plea. The plea shows that defendant had been in jeopardy once under an indictment charging him with having committed perjury in making oath to an affidavit dated <sup>472</sup> the "28th day of November, 1890." But the plea does not show that he had been in jeopardy for making oath to an affidavit dated the "29th day of November, 1890." It may have been true that defendant did not know his wife's address on November 28, 1890, and yet also true that he did know her address the next day. But there is a further difficulty to be considered. It is a general rule in criminal pleading that the time at which an offense is charged to have been committed is not material, unless time be of the essence or gist of the offense: *Commonwealth v. Monahan*, 9 Gray, 119.

From the averments of the plea, including the record of

the first trial, it is obvious that the variance whereby defendant obtained a verdict did not arise from a mere difference between the allegations of the indictment and the proof offered as to the time when the offense was committed; the variance consisted in matter of description. By the first indictment defendant was charged with having committed the crime of perjury, by making oath to a certain sworn instrument of writing bearing a particular date; the proof offered was an instrument bearing a different date. There was a variance, therefore, in the description of the written instrument upon which the charge of perjury was based; besides, such written instrument was matter of record in the divorce suit; it was essential to the jurisdiction of the court in that suit. The variance, therefore, must be held to be material and substantial as a description of the particular offense. Such particular description was, perhaps, unnecessary; but whether a less particular description would have been sufficient we do not determine; the description of the affidavit having been made *in hæc verba*, it was necessary to prove it as made in order to sustain a conviction under the particular count of the indictment tried and determined: *State v. Ammons*, 3 Murph. 123.

2. In determining whether or not a plea of *autrefois acquit* is sufficient in law in a case of this kind the following may generally be regarded as the proper test: Was the matter set out in the second indictment admissible as evidence under <sup>473</sup> the first, and could a conviction have been properly maintained upon such evidence? If yes, then the plea is sufficient; otherwise, it is not.

The affidavits set out *in hæc verba* in the indictments respectively were variant in description; the variance was material. The allegations of the two indictments clearly indicate two different affidavits, though in fact there may have been but one. Each of the affidavits bears a single date; such date cannot, therefore, be both November 28th and November 29th. Therefore, the affidavit particularly described in the second indictment was not admissible under the first indictment. The variance did not arise from the difference in time as to the alleged commission of the offense, but from a difference in date of a writing, a matter of record, particularly described and relied upon to sustain the conviction. The court did not err in sustaining the demurrer to the plea of *autrefois acquit*.

The opinion in the case of *State v. Blanchard*, 74 Iowa, 628,

is relied on as sustaining the plea in this case. It seems to have some bearing contrary to our conclusion. But the instrument in the Iowa case was not a matter of record; and the question decided did not arise upon a plea of *autrefois acquit*. Besides, as the opinion of the court shows, the case was submitted and determined "without argument by counsel for either party." The opinion cites no authorities upon the precise question raised in this case. Upon careful consideration it is clear that the current of authority sustains the views we have expressed: 1 Greenleaf on Evidence, secs. 55-65; 1 Bishop's Criminal Law, sec. 1052; 1 Wharton's Criminal Evidence, sec. 103; 1 Archbold's Criminal Practice, 375, and notes; *United States v. McNeal*, 1 Gall. 387; *United States v. Bowman*, 2 Wash. C. C. 328; *United States v. Denicke*, 35 Fed. Rep. 407; *People v. Hughes*, 41 Cal. 234; *State v. Porter*, 2 Hill (S. C.), 611; *Keator v. People*, 82 Mich. 487; *State v. Clark*, 2 Tyler, 282.

3. Certain jurors were challenged on the ground that they had served as jurors in the county or district court of the county within the year next preceding. The challenges were<sup>474</sup> based upon section 2595 of 2 Mills' Annotated Statutes. This statute as amended was passed in 1889. It provided that any person who had served as a juror in any district or county court at any time within the year next preceding should be liable to challenge for cause. But subsequently an act was passed providing for the selection and qualification of jurors, and to repeal all acts and parts of acts in conflict therewith. Section 4 of the latter act provides in detail for the impaneling of jurors; it provides, among other things, as follows:

"Whenever it shall be necessary to summon talesmen the court, in its discretion, shall direct that they be drawn from said box, or summoned from the bystanders, provided that either party may show cause why talesmen should not be summoned from the bystanders, or may issue an open venire as heretofore practiced, and, in every case, the *venire facias* shall be returnable as the court shall direct, provided it shall be ground for challenge to any person so summoned from the bystanders on an open venire, if he shall have served as a juror either in a regular panel or as a talesman in any court of record within one year then last past": Sess. Laws, 1891, p. 251.

Section 2595, above referred to, is not expressly repealed by the act of 1891; but from the scope and character of the latter

act there can be no doubt it was intended to supersede section 2595, in respect to the ground of challenge above stated. Unless the statute of 1891 has this effect it has no effect; a construction to be avoided, if possible. The examination of the challenged jurors did not disclose that either of them was summoned from the bystanders upon open venire to try this case; hence, they were not liable to the challenge interposed.

One juror mentioned in the assignment of errors was challenged on the ground that he had formed an opinion. The assignment is not insisted upon in argument before this court nor did his examination show that he was disqualified by reason of having formed or expressed an opinion as to the guilt or innocence of the accused.

<sup>475</sup> 4. The court, against the objection of defendant, ordered that Susan A. Dill, wife of defendant, might testify as a witness in behalf of the state. This ruling is assigned for error.

Mrs. Dill testified that she was married to defendant in 1874; that her husband had come to Colorado; and that on November 10, 1890, she left Chicago and came to Pueblo, Colorado, where she found him living with another woman; that she and her husband came to Denver on November 18th; that after four or five days her husband said he could not find work, and so insisted upon her returning to Chicago; that on November 23, 1890, he took her to the depot, put her on the car, stayed with her till the train started, and then bade her good-by, saying he would be home by Christmas.

The witness stated details and circumstances usually accompanying such occurrences. She further testified that her husband knew that she was going to her daughter's, at No. 18 Cypress street, Chicago, Illinois, to stay until he should return to her. That she wrote to him within a day or two after she reached her destination, and that within the month following he wrote to her frequently at said postoffice address. His letters to her were identified and read in evidence; they show him to be a thoroughly bad man.

The statute of this state provides that all persons may be witnesses with certain exceptions; among the exceptions are the following: "A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other

during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other": Gen. Stats. 1883, sec. 3649, p. 1062.

The contention in behalf of the state is that defendant, in making the false affidavit in the divorce suit against his wife, committed a crime against her; that the crime was a wrong <sup>476</sup> and injury to her individually; that it violated her rights and privileges in the divorce suit, and otherwise affected her personal interests; and hence that she was a competent witness against her husband in a prosecution for said crime.

Counsel for defendant contends that a wife cannot testify against her husband without his consent except in a case where he is charged with the commission of actual or constructive violence against her person. Counsel state their views as follows: "The wrong committed by a person in making a false affidavit in a divorce suit is one against the public administration of justice, and while in its effect it may fall more heavily upon one person than another, yet it does so only in a general sense, and with relation to relative rights, and is not an invasion of the rights of personal security."

The general rule at common law was that neither husband nor wife was a competent witness for or against the other. But the rule had this exception, that if either was prosecuted for a felonious crime or high misdemeanor involving violence to the person of the other, the party against whom the crime was committed was a competent witness in behalf of the state.

In *Cotton v. State*, 62 Ala. 12, a married woman and her paramour were jointly indicted and tried for living in adultery. It was held that the husband was incompetent to testify on the trial against either of them. The decision appears to have been based upon the common law; it does not refer to any statute upon the subject.

In *Commonwealth v. Sapp*, 90 Ky. 580, 29 Am. St. Rep. 405, defendant was indicted for an attempt to poison his wife. It was held that the wife was a competent witness against him to prove that she saw him sprinkle some substance on food intended for her; the food thus prepared was produced at the trial and proved to contain arsenic.

The statute of Texas provided that: "The husband and wife may in all criminal actions be witnesses for each other,

but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against <sup>477</sup> the other." Under this statute it was held that the wife was not a competent witness against the husband in a prosecution against him for incest.

*State v. Sloan*, 55 Iowa, 219, was a case in which the defendant was indicted for bigamy. The statute provided that neither the husband nor wife shall be a witness against the other, except in a criminal proceeding for a crime committed by one against the other. The court said: "In our opinion, if the defendant is guilty of bigamy, he committed a crime against his wife. We think that she is a competent witness."

In *State v. Hughes*, 58 Iowa, 165, the defendant was indicted for bigamy. It was held that the oral testimony of the lawful wife was competent in behalf of the state for the purpose of proving a marriage between herself and defendant.

In Nebraska the statute provided that: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other; but they may, in all criminal prosecutions, be witnesses for each other." In *Lord v. State*, 17 Neb. 526, upon the trial of an indictment against a man for deserting his wife, and living and cohabiting with another woman in a state of adultery, the wife was held to be a competent witness against him.

The case of *Bassett v. United States*, 137 U. S. 496, is much relied on by counsel for defendant. In that case the court had under consideration a conviction for polygamy under the laws of Utah. The Civil Code of that territory was the same as our statute in respect to the examination of husbands and wives as witnesses against each other, except that our statute applies to both civil and criminal proceedings, but the Criminal Code of Utah was as follows:

"Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties."

On review by the United States supreme court it was held that the wife was not a competent witness. The decision <sup>478</sup> was fully warranted by the Criminal Code of Utah, and so the opinion of Mr. Justice Brewer declares; but he expressed

the further view that the wife was an incompetent witness even under the terms of the Civil Code.

That the making of the affidavit, if false, was a crime is conceded. But it is contended by defendant's counsel that it was a crime against the state—a crime against society—a public crime, but not a crime against the wife.

All crimes are crimes against the public; the first element of a crime, as stated in our criminal code, is that it "consists in a violation of a public law": Gen. Stats., 232. But crimes directly affecting particular persons or individuals are uniformly considered crimes against such persons or individuals. For example: The murderer commits a crime against the person whose life he destroys; the thief commits a crime against the person whose property he steals; the libeler commits a crime against the person whose good name and fame he destroys or injures; and yet all these several classes of crimes are crimes against the public.

Blackstone says: "In all cases the crime includes an injury; every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community": 4 Blackstone's Commentaries, 4.

From a review of the decisions it appears that there is some conflict in respect to the question as to when a husband or wife may testify against the other, under statutes like ours. In Texas a late decision seems to limit the wife's right to testify against her husband to cases of violence against her person as at common law. On the other hand, the Iowa and Nebraska decisions, under a statute like ours, extend the right to the wife to testify against her husband in any criminal action or proceeding for any crime committed against her, and bigamy and adultery are held to be crimes against the lawful wife.

Our statute does not limit the right of the husband or wife to testify to criminal prosecutions for crimes involving personal violence, either actual or constructive; the language <sup>479</sup> is unqualified that the husband or wife may testify against the other "in a criminal action or proceeding for a crime committed by one against the other." This language is broad enough to include any crime, whether of violence to the person or other crime committed by the husband or wife directly affecting the other.

Since some private wrong or injury is included in every crime, it is evident that the word "crime" in that clause of the



statute which permits the husband or wife to testify against the other in a "criminal action or proceeding for a crime committed by one against the other," means the private wrong or injury included in such public crime. The word must have such meaning, or the statute is meaningless. It follows that a wife is competent to testify against her husband in a criminal action or proceeding whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted.

In the case at bar defendant was charged with committing the crime of perjury in an action for divorce against his wife. The purpose of the affidavit was to aid him in his suit against her; it was to give the court jurisdiction of the cause without personal service of process upon his wife; and the object of that portion of the affidavit of which perjury is predicated was to enable him to give the court jurisdiction without mailing a copy of the summons to his wife. If, in making such affidavit, defendant committed perjury, the effect of his crime was to diminish the wife's chances of obtaining notice of the divorce suit, and thus deprive her of the privilege of making any defense. It is clear, therefore, that she was the particular individual whose private rights and interests would be affected by the crime. It is true the crime of perjury committed in such a case was a crime against the public administration of justice; the public are deeply interested—every good citizen is interested—in punishing and preventing the crime of perjury; but the perjury in this case was calculated to inflict upon the wife of defendant a direct private injury to her individual rights and interests. That the crime was <sup>480</sup> against her, in the sense in which every crime is an injury to a particular individual, cannot be doubted. In the first place the perjury was liable to deprive her of the right of making defense; if deprived of that right she might be wrongfully deprived of her husband, and of her right to support from his estate or from his labor; besides, if divorced, she would be subjected to the stigma of having been false to her marital vows. A decree of divorce, in the estimation of all good people, causes ignominy and disgrace to fall, more or less heavily, according to the nature of the case, upon the party adjudged to be in the wrong. The rule of the common law that a wife may testify against her husband in a case where he is charged with a crime of violence against her person rests, it is said, upon the principle of affording her the

means of self-protection. In the ruder period in which the common law took its rise life and limb were principally regarded; property was also esteemed worthy of protection, but the property rights of the wife were greatly restricted, and her personal *status* was almost entirely merged in that of her husband. In the present age there have been great changes; other than tangible things are more highly esteemed; should it, therefore, be deemed strange that modern legislation should give the wife the means of protecting that which is often dearer to her than life, liberty, or property?

"Who steals my purse steals trash;  
But he that filches from me my good name  
Robs me of that which not enriches him,  
And makes me poor indeed."

The reasoning of the learned justice in *Bassett v. United States*, 137 U. S. 496, though well expressed, does not shake our conclusion in this case. Even if it may be said that the offenses of adultery, incest, bigamy, and polygamy, committed by a husband, are not crimes against the wife, for the reason that they imply no fault on her part, and inflict no direct injury to her absolute rights as an individual (points we do not decide), still it cannot be maintained that a husband does not commit a crime against his wife when, in a suit for divorce, <sup>481</sup> he commits the crime of perjury for the purpose of having her adjudged guilty of a matrimonial offense, so as to obtain a decree against her, and thus deprive her of property rights, besides fastening a stigma upon her character.

In this case defendant instituted the action against his wife; he made oath to the false affidavit in the cause against her; he did this for the purpose of procuring constructive service of summons against her. The perjury committed in making such affidavit was a crime against the public; but if it was not also a crime against the wife, whose name and rights were assailed, where shall we look for the private wrong or injury included in such public crime? If not the wife, then what individual was particularly affected by such crime?

We are not prepared to believe that the statute under consideration was intended to be declaratory of the common law merely. In this connection it is proper to notice again the tendency of modern legislation in this state. For many years it has been the policy of our people to enlarge the rights of married women, and to give them greater protection in every direction, until at last they have been fully enfranchised.

So, also, the same tendency marks the legislation upon the subject of witnesses; the rule as to competency has been gradually extended and broadened until very few common-law restrictions remain.

In our opinion the trial court did not err in allowing the wife to testify in behalf of the state in this case. This disposes of the matters presented to this court upon this review. No substantial error appearing in the record, the judgment of the district court is affirmed.

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**INDICTMENT—VARIANCE—TIME.**—The time of the commission of an offense must be proved as laid in the indictment only when time is of the essence of the offense, or a necessary ingredient in the description of it: *Miller v. State*, 33 Miss. 356; 69 Am. Dec. 351, and note; *State v. Barnett*, 3 Kan. 250; 87 Am. Dec. 471, and note. The indictment must state the time when an offense was committed, but the proof need not be confined to that time; it is only necessary to show that the offense was committed prior to the finding of the indictment: *State v. Orrell*, 1 Dev. 139; 17 Am. Dec. 562, and note; and, within the statute of limitations, *Cook v. State*, 11 Ga. 53; 56 Am. Dec. 410, and note.

**WITNESSES—WHEN HUSBAND AND WIFE CAN TESTIFY AGAINST ONE ANOTHER.**—A wife may testify against her husband as to a crime against her own person: *Commonwealth v. Sapp*, 90 Ky. 580; 29 Am. St. Rep. 405, and extended note. See, also, the extended note to *State v. Boyd*, 27 Am. Dec. 377.

**AUTREPOUR, WHEN PLEA OF WILL PREVAIL:** See the extended notes to *State v. Nash*, 41 Am. Rep. 475; *People v. Bentley*, 11 Am. St. Rep. 228; and the cases of *Jones v. State*, 66 Miss. 380; 14 Am. St. Rep. 570, and note with the cases collected; and *Hooper v. State*, 30 Tex. App. 412; 28 Am. St. Rep. 224, and note.

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**MERCHANTS' DESPATCH TRANSPORTATION COMPANY**  
**v. FURTHMANN.**

[149 ILLINOIS, 66.]

**CARRIERS—LIMITATION UPON LIABILITY—BILLS OF LADING.**—When goods are shipped under a verbal agreement before any written contract or bill of lading has been tendered to the shipper, the subsequent acceptance of a bill of lading without assenting to its conditions does not preclude the shipper from showing what the actual agreement was, in an action to recover for a loss.

**CARRIERS—BILLS OF LADING ARE BOTH RECEIPTS AND CONTRACTS TO CARRY.**—In so far as they acknowledge the delivery and acceptance of the goods, they are mere receipts, and, as to the rest, they are contracts.

**CARRIERS—LIMITATIONS UPON LIABILITY—RECEIPT AS CONTRACT OF SHIPMENT.**—A receipt for goods given by a common carrier, with an unsigned contract to carry upon certain conditions printed on the back thereof, and stating that a bill of lading is to be given thereafter, does not constitute a special contract of shipment limiting the carrier's liability.

**CARRIERS—LIMITATION OF LIABILITY BY NOTICE.**—The common-law liability of common carriers cannot be restricted by notice whether brought home to the shipper or not.

*W. H. and J. H. Moore and Purcell*, for the appellant.

*Edmund Furthmann and William M. Johnson*, for the appellee.

66 WILKIN, J. Appellee sued appellant in the superior court of Cook county, to recover the value of certain beer alleged to have been shipped by him over its line from New York to Chicago, which was spoiled and lost to the plaintiff while *en route*. The 69 trial resulted in a judgment for



verdict of the jury and judgment of affirmance by the appellate court has conclusively established the fact, "that prior to the reception of the goods the carrier agreed with the shipper to transport them in 'cold service,' and, before any bill of lading was made, had shipped the goods." The contract of carriage having been entered into there, the laws of New York will control as to its nature, interpretation, and effect. Authorities need not be cited in support of this proposition.

It was said in *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475: "It has been repeatedly adjudged in this state the acceptance by the shipper, on the delivery of the goods for transportation to the carrier, of a receipt or bill of lading signed by the carrier, expressing the terms and conditions upon which they are received and are to be carried, constitutes, in the absence of fraud or imposition, a contract controlling the rights of the parties." The general rule thus stated has, so far as we know, been uniformly adhered to by the courts of that state.

It was, however, decided in the case of *Bostwick v. Baltimore etc. R. R. Co.*, 45 N. Y. 712, that where goods were shipped under a verbal agreement, before any written contract or bill of lading had been tendered to the plaintiff, the subsequent acceptance of a bill of lading without assenting to its conditions would not conclude the shipper. It was there said: "There was no contradiction attempted of the evidence of the plaintiff that he made a verbal contract with Cooke for the transportation of the fifty-four bales through to New York by 'all rail,' and agreed to pay the all-rail rate. The goods were shipped under this verbal agreement before any written contract or bill of lading had been tendered to the <sup>71</sup> plaintiff. The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a subsequently written contract does not apply to such a case as this. . . . If the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated, and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff

from showing what the actual agreement was under which the goods had been shipped." The doctrine is recognized in *Germania Fire Ins. Co. v. Memphis etc. R. R. Co.*, 72 N. Y. 90; 28 Am. Rep. 113. See, also, *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206.

The scope of the latter decision on this point is accurately stated in the *syllabus* as follows: "The parties made a special contract as to the transportation of the oil. Two months after its delivery at Panama the common agent of the defendants here executed bills of lading, which were sent to plaintiffs, but were not received until after the oil had left Aspinwall. The contract, as set forth in the bills, was different from that actually made. Held, that defendants could not alter or abrogate the contract actually made by issuing bills of lading, and, in the absence of proof establishing that plaintiff consented to accept the bills in place of the prior contract, the latter must control."

Leaving out of consideration, then, the receipt of May 4th, the rights of the parties would clearly be controlled by the above-mentioned verbal agreement. But counsel for appellant contend that that receipt, with its conditions, became the contract of the parties at its date, when the goods were delivered, and continued to be the contract until May 6th, when <sup>72</sup> the bill of lading was delivered, during which time the goods were *en route*, and therefore the doctrine of *Bostwick v. Baltimore etc. R. R. Co.* 45 N. Y. 712, has no application. Upon the facts of the case we are clearly of the opinion that the paper delivered by the carrier to the shipper on May 4th was in no sense a contract of shipment. If, as is contended, the receipt of May 4th and the bill of lading of the 6th are identical in their legal effect, and the former was intended by the parties as a contract of shipment, the question naturally arises, Why was the bill of lading made? If the parties intended the receipt to be the contract of shipment, with the same conditions as the bill of lading afterwards delivered to the shipper, why were the conditions not put in the receipt as they were in the bill of lading, instead of being merely printed on the back of it, and referred to? The proper construction of the two papers is essentially different. The receipt is an attempt by the carrier to limit its common-law liability by notice: *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 244; *Newell*



*v. Smith*, 49 Vt. 255; *Ayres v. Western R. R. Co.*, 14 Blatchf. 9; *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, 45 Barb. 288; *Southern Express Co. v. Purcell*, 37 Ga. 103; 92 Am. Dec. 53; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

In the latter case the carrier gave a receipt for goods as follows:

"Received from V. & M. Bostwick, as consignor, the articles marked, numbered, and weighing as follows [wool described], to be transported over said road to the depot in Detroit, and there to be delivered to . . . agent or order, upon the payment of the charges thereon, and subject to the rules and regulations established by the company, a part of which notice is given on the back hereof. This receipt is not transferable.  
HASTINGS, Freight Agent."

On the back was printed the following:

"The company will not be responsible for damages occasioned by delays, storms, accidents, or other causes, . . . and all goods and merchandise will be at the risk of the owner thereof while in the company's warehouses, <sup>78</sup> except such loss or injury as may arise from the negligence of the agents of the company." The action was for a loss of the wool by fire while in the depot at Detroit. Justice Davis, delivering the opinion of the court, passing upon the effect of the receipt, said: "It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharges them. The position is, that the unsigned notice printed on the back of the receipt is a part of it, and that taken together they amount to a contract, binding on the defendant in error." After referring to the cases holding that a carrier can, by special contract assented to by the shipper, limit his liability, he holds that the receipt and notice did not amount to such a contract, and says the weight of authority is against its validity. Justice Breese, rendering the opinion of this court in the case of *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760, speaking of the receipt there relied upon, said: "No distinction has been attempted to be made, nor can be made, between a public notice in the newspapers or by handbills or otherwise, and the notice conveyed by this receipt, it being printed on the back of it, for wherever it may be found it is but notice."

Bills of lading are both receipts and contracts to carry. "So far as they acknowledge the delivery and acceptance of the goods they are mere receipts; as to the rest they are contracts": Hutchinson on Carriers, 122. If the contention of appellant is correct, the paper of May 4th is a receipt for the goods, with a contract to carry upon certain conditions printed on the back of it, signed by no one. We are clearly of the opinion that such a receipt should not be given the legal effect of a special contract limiting a public carrier's common-law liability. No good reason can be shown why, if the intention is to so contract with the shipper in good faith, the conditions should not be embodied in the contract and properly signed, <sup>74</sup> as was done in the bill of lading dated May 6th, and this we understand to be in harmony with the decisions in New York. There the court of appeals has, as before stated, held that where the conditions are embodied in the receipt or bill of lading, as in *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575, the acceptance of the paper is conclusive evidence of the fact that the shipper knew its contents and assented thereto; but we have been able to find no decision of that court giving such a construction to a mere receipt calling attention to conditions on the back of it. On the contrary, it has there been uniformly held that the liability cannot be restricted or limited by notice, whether brought home to the shipper or not: *Belger v. Dinsmore*, 34 How. Pr. 421, and cases cited. Moreover, the receipt of May 4th bears upon its face a refutation of the idea that the shipper assented to it as a contract of shipment. It states that a bill of lading is to be given thereafter. That fact also shows that neither party intended it to be more than a receipt for the goods. The evidence as to the custom of parties in like transactions tends to support this view, and the appellate court has so found the fact.

In our opinion the transaction, as evidenced by the two papers, shows on its face that the only contract of shipment ever made between the parties, in writing, was the bill of lading issued after the goods had been shipped, and that the case is clearly within the rule announced in *Bostwick v. Baltimore etc. R. R. Co.*, 45 N. Y. 712.

The judgment will be affirmed.

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**BILLS OF LADING—NATURE AND CONCLUSIVENESS OF.**—The acceptance of a bill of lading by the shipper with knowledge of its contents makes it a binding contract, and defines the rights and liabilities of the parties to it. The bill of lading is both a receipt and a contract. As a receipt it is explain-

able as between the shipper and the carrier; but parol evidence is not admissible to vary the terms of that portion of it constituting the contract: *Van Etten v. Newton*, 134 N. Y. 143; 30 Am. St. Rep. 630, and extended note.

**CARRIERS—LIMITING COMMON-LAW LIABILITY BY NOTICE.**—This question is thoroughly discussed in the extended note to *Kansas City etc. R. R. Co. v. Radebaugh*, 5 Am. St. Rep. 720.

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## HEFFRON v. RICE.

[149 ILLINOIS, 216.]

**RECEIVERS—PAYMENT OF INTEREST BY—CREDIT FOR.**—A receiver who pays interest on debts secured by deed of trust on the assigned property is entitled to credit therefor, although such interest is paid out of money borrowed by him from one of his insolvent assignees and afterwards repaid to the latter by him.

**RECEIVERS—RIGHT TO BORROW MONEY.**—Although a receiver may have no right to borrow money, yet if he uses money borrowed by him to discharge a valid lien on the property committed to his charge, and acts in good faith in making the payment, he is entitled to credit therefor as against the insolvent debtors who have received the benefit of the payment.

**RECEIVERS HAVE NO RIGHT TO LOAN FUNDS** coming to their hands as receivers. If they loan such money and lose it they must stand the loss, except under special circumstances.

**RECEIVERS—LIABILITY FOR LOANS MADE BY.**—A receiver acting as the manager of a hotel business must necessarily exercise his discretion in many cases. If he acts in good faith, and conducts the business as a prudent person would his own, he is not liable for the loss of a small loan made to a guest.

**RECEIVERS—PROOF OF ACCOUNT.**—When a receiver's account consists of numerous items of payments made in the regular course of business, for some of which he has no receipts, but all of which are fully and correctly entered in books kept by him, his account should be approved by the court.

**RECEIVERS—DUTY TO FILE INVENTORY—LIABILITY FOR DELAY.**—It is the duty of a receiver to make out and file with the court a list of the property which passes into his hands, so that creditors and all persons interested may know what property belongs to the parties in the case. A delay in filing such inventory is no ground of complaint, unless injury is shown to have been caused thereby.

**RECEIVERS—COMPENSATION OF.**—In the absence of legislation regulating the compensation of a receiver the court appointing him has the right to determine the amount that shall be paid, and, in passing upon such compensation, the appellate court ordinarily defers to the judgment of the appointing court.

**RECEIVERS—MEASURE OF COMPENSATION.**—The compensation received by a receiver should correspond with the degree of business capacity, integrity, and responsibility required in the management of the affairs intrusted to him. A reasonable and fair compensation should be allowed, according to the circumstances of each case.

*Osborne Brothers and Burgett*, for the appellant.

*Curtis H. Remy*, for the appellee.

**218** CRAIG, J. This is an appeal from a judgment of the appellate court, affirming a judgment of the superior court of Cook county, wherein the accounts of James H. Rice, receiver, were confirmed and approved.

On the ninth day of January, 1889, James J. Gore filed a bill in the superior court of Cook county, against Patrick H. Heffron, for a dissolution of a partnership, for an accounting and injunction, and for the appointment of a receiver for certain leasehold interests in lots 14, 15, 16, and 17, in block 115, school section addition to Chicago (being a strip of land one hundred feet in width, and extending from Clark street to Pacific avenue), and the two buildings on said lots (the Gore Fire-Proof European Hotel building, and the Open Board of Trade building), and the hotel business of such hotel. On the twenty-second day of January, 1889, the court appointed James H. Rice receiver. The order under which he was appointed was as follows: "Upon agreement of the parties hereto, it is ordered that James H. Rice be and he is hereby appointed receiver of the joint estate, property, real and personal, things in action, debts, equitable interests, and other effects which belong to, and are held in trust for, the complainant, James J. Gore, and the defendant, Patrick H. Heffron, and especially the hotel business conducted on the property, known as Gore's Hotel, as described in the bill herein, and all personal property therein situated, to collect all rents and to control and manage the same, and to continue the said hotel business until the further **219** order of this court, upon said receiver filing a bond as such receiver in the penal sum of twenty-five thousand dollars (\$25,000), with surety to be approved by this court, conditioned for the faithful performance of his duties as such receiver." Rice acted as receiver under the appointment until July 16, 1889, when he resigned, and Nicholas D. Laughlin was appointed in his place.

In his account Receiver Rice claimed, and was allowed by the court, credit for three thousand seven hundred and forty-nine dollars and fifty-eight cents, which is claimed to be erroneous. Gore and Heffron were indebted to various creditors in different sums, for which they had given their notes, and executed a trust deed to Lyman J. Gage on the hotel property to secure their payment. The interest on these notes

became due semi-annually, and the above sum was interest paid by the receiver on notes secured by the trust deed. It appears, from the evidence, that Gore advanced Rice a part of the three thousand seven hundred and forty-nine dollars and fifty-eight cents, and Rice subsequently repaid the amount advanced. We attach no importance to this fact. The payment stands on the same footing as if the entire amount had, in the first instance, been paid by the receiver from funds held by him as receiver. The interest was due from Gore and Heffron. The property in the hands of the receiver was pledged for its payment, and they jointly received the benefit resulting from the payment, and we perceive no just ground upon which either could complain.

It is said the receiver had no right to borrow any part of the money from Gore or any other person. That may be true; but, at the same time, when the receiver used the money to discharge a valid lien on the property committed to his charge and custody, and acted in good faith in making the payment, after Gore and Heffron have received the benefit from the payment, we think the court properly allowed the receiver credit for the sum paid out.

It is also claimed that it was error to allow Rice a credit in his account of twenty-five dollars on account of the Mitchell draft. It <sup>220</sup> appears that Mitchell was a guest at the hotel kept by the receiver, and twenty-five dollars was advanced to Mitchell on his draft, which was subsequently returned dishonored. The master in chancery, in his report, disposed of the item by holding: "It is not an unusual thing for hotel managers to make small advances of this character. I think the loan in this instance may be properly considered one of the risks of the business, and charged to the profit and loss account of the hotel." It is true that the receiver had no right to loan the funds which came into his hands as receiver, and if he made a loan and lost the money he ought to be required to stand the loss. But, in the management of the business of the hotel, the receiver, of necessity, was required in many cases to exercise his discretion, and if he acted in good faith, and conducted the business as a prudent person would manage his own business, he ought not to be held responsible for a small loss like the one involved: Beach on Receivers, sec. 256.

It is next claimed that the court erred in allowing the receiver credit for seventy-three items, amounting to nine thou-

and one hundred and thirty-five dollars and seventy-four cents, set forth in objections filed to the receiver's account. When Rice was appointed receiver he found the business divided into departments, consisting of the hotel business, the Open Board of Trade building, consisting of seventy-four offices, the bar, and the restaurant in the basement. Walter W. Eaton had charge of the Open Board of Trade building when Rice was appointed receiver, and he was continued in charge while Rice remained receiver. He had charge of renting the offices, collecting the rents, hiring help, and paying the expense of help, and other small items in connection with the building. Rice also continued Nicholas D. Laughlin as manager. He testified in regard to his duties, as follows:

"Q. What were your duties during Rice's receivership?  
A. Manager of the hotel business, of the office, and rooms. I did not have charge of the bar, the restaurant, or the Open Board of Trade building. I collected the rent for the stores in ~~221~~ the hotel building. I kept the general cash-book and ledger, which were in my private office. I received the moneys from the rent of rooms, which were turned over to me by the hotel clerks, the moneys from the restaurant, which were turned over to me by the cashier of the restaurant, and the moneys from the bar, which were turned over to me by the barkeepers. Such clerks and such cashier put their receipts in the hotel safe at night, and I took them out in the morning. I got the receipts from the bar daily. In such cash-book account was kept of the moneys received and paid out. I kept a book for copies of monthly statements made up from my cash-book. In my cash-book I kept account of the moneys turned in to me from the hotel office, and from the restaurant and bar, and in such cash-book the disbursements were also entered. Nearly all the moneys paid out were paid out by me. I bought the linens and supplies for the hotel proper. I paid the help for the hotel, the restaurant, and the engineers and their men. The payments mentioned in the pay-roll slips were made by me. There were monthly pay-rolls and weekly pay-rolls. The hotel help were paid monthly. The help in the restaurant and bar, and all the engineers except one, were paid weekly. All employees of Rice, as receiver, were paid out of moneys that came into his hands as receiver. None were paid out of his private funds."

This witness further testified: "I assisted Eaton in making up Rice's account [Exhibit 1] of the moneys received and paid out by Rice during his receivership. The data from which this account was made were obtained from my cash-book. The only assistance that I gave Eaton in making up the account of the receipts and disbursements of Rice during his receivership was in showing him any thing he wanted to find out, and answering his questions. I have not examined Rice's Exhibit 2 [the detailed statement of petty items], or compared it with my cash-book. I have taken Eaton's word that the items of Exhibit 2 were correctly copied from the cash-book." <sup>222</sup> Later the witness testified: "I have now [April 6, 1892] compared Exhibit 2 with my cash-book, and find it correct." He also testified: "I know the cash-book is correct."

Eaton testified: "The statement [Exhibit 1] filed March 15, 1892, purporting to show the moneys received and paid out by Rice, as receiver, from January 23 to July 17, 1889, is in my handwriting. I began it in January, 1892, and finished it about March 1st. The data contained in that statement I obtained from the cash-book kept at the hotel during that period. In making that statement I did not have access to the books of the Open Board of Trade building. I kept the Open Board report, and we kept that compared every week or two with the hotel part of the Open Board record. They are the same. That statement shows the total receipts from, and disbursements for, Gore's Hotel and the Open Board of Trade building from January 23 to July 17, 1889. It is an exact copy of the amounts as they appear on the cash-book from day to day. Sixty-six thousand three hundred and three dollars and eighty-three cents was the amount received by Rice, as receiver, and the same amount was paid out by him, if we include the amount turned over to receiver Laughlin. That statement was compared with the vouchers."

The witness Laughlin also testified: "Most of the vouchers filed here by Rice were collected by me. While I was manager for Rice a great many small sums were paid out without any vouchers being taken, but vouchers were taken for the larger amounts. Vouchers were not taken for moneys paid to help. I don't know whether it is customary to take vouchers for moneys paid to help. The small sums that I have mentioned are covered by the detailed statement [Exhibit 2] now shown me."



From the evidence it is apparent that from the time Rice entered upon the discharge of his duties as receiver until he resigned a regular cash-book was kept, in which all money received and paid out was entered. The entries in the cash-book were proven to be a correct account of what was received <sup>223</sup> and what was paid out, and Rice's account as receiver was made up from this book. Some small items, as appears, were paid out for the bar and restaurant, and perhaps for some other matters needed in the hotel, for which no receipts were taken. But these payments were made in the regular course of business. The amounts were at the time entered in the cash-book as paid, and the entries in this book proven to be correct. Under this evidence we regard the order of the court approving the account of the receiver correct.

Complaint is also made that the receiver failed to make out an inventory of the property when he entered upon the discharge of his duties as receiver. We think it is the duty of a receiver to make out and file with the court, when he is appointed, a list of the property which passes into his hands, so that creditors and all persons interested may know what property belongs to the parties in the case wherein the receiver has been appointed. It is true that Rice did not immediately make out an inventory of the property which passed into his possession, but subsequently an inventory was made out, which will be found in the record as Exhibit 26, which both Laughlin and Eaton, who were in the possession of the property at the time Rice was appointed, testify contains a correct description of the property. In this connection it will be observed that when Rice resigned he turned over all the property to his successor, as will appear from the receipt of his successor, as follows:

"Received of James H. Rice, late receiver, \$2,650.25, being cash on hand, all books of account and vouchers in my possession, and all personal property of every description, including furniture, fixtures, supplies, etc., in Gore's Hotel, together with the possession of said hotel and the Open Board of Trade building, and all leases and documents pertaining to the leaseholds.

NICHOLAS D. LAUGHLIN, Receiver.

"Dated July 19, 1889."

<sup>224</sup> There is no pretense that Rice converted any of the property to his own use, or failed to account for any thing that passed into his hands, nor is there any claim that any

injury has resulted from the fact that an inventory was not at once made out and filed. Under such circumstances there is no substantial ground for the complaint made as to this branch of the case.

It is also claimed that the court erred in allowing the receiver two thousand six hundred dollars for his services.

The record contains evidence that the services were worth one thousand dollars per month, which is almost double the amount allowed. In the absence of legislation regulating the compensation of a receiver, the court in which he is appointed has the right to determine the amount that should be paid, "and in passing upon the compensation of a receiver an appellate court will ordinarily defer much to the judgment of the court below by which the receiver was appointed, that court having had supervision of his conduct": *High on Receivers*, sec. 781. The author, in section 783, also lays down the doctrine, that, as a general rule, the compensation should correspond with the degree of business capacity, integrity, and responsibility required in the management of the affairs intrusted to him, and that a reasonable and fair compensation should be allowed, according to the circumstances of each particular case. Under the rule indicated we do not think the court, in view of all the facts and circumstances connected with the transaction, allowed more than what may be regarded a reasonable compensation.

The judgment of the appellate court will be affirmed, not, however, on the grounds upon which that court based its judgment.

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**RECEIVERS HAVE NO POWER TO LOAN MONEY** coming into their hands as receivers: *Ryan v. Morrill*, 83 Ky. 352; *State v. Gooch*, 97 N. C. 166; 2 Am. St. Rep. 284.

**RECEIVERS—COMPENSATION.**—In arriving at the compensation to be paid a receiver, the responsibilities assumed, and the care, skill, and labor expended, should be taken into consideration and the remuneration fixed upon the prices usually paid for similar services in view of the facts of each case: *Tompson v. Huron Lumber Co.*, 5 Wash. 527.

## CHICAGO, BURLINGTON, AND QUINCY RAILROAD COMPANY v. JONES.

[149 ILLINOIS, 361.]

**RAILROADS—STATUTES NOT VOID FOR UNCERTAINTY.**—A statute declaring that if any railroad corporation shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight it shall be deemed guilty of extortion, is not void for uncertainty in not declaring what is a fair and reasonable rate. The courts have power to determine what is reasonable.

**COMMON CARRIERS ARE OBLIGED** by the common law to receive and carry all goods offered for transportation upon receiving a reasonable hire; and the courts are competent to ascertain and determine what hire is reasonable.

**RAILROADS—LEGISLATIVE POWER TO FIX FREIGHT AND FARE CHARGES.**—The legislature has power to declare what are reasonable rates of compensation for the carriage of freights and passengers by railroads, but, in the absence of statutory regulation, the courts must decide what are reasonable rates.

**RAILROADS—REGULATION OF FREIGHTS AND FARES—POWERS OF LEGISLATURE AND COMMISSIONS.**—The legislature has power to directly fix the rates of charges to be made by railroads for the carriage of freights and passengers. It also has the right to declare what is reasonable. When it does so, its declaration is conclusive as to the reasonableness of the rates; and a charge beyond the maximum fixed by it must be regarded as unreasonable; but, when the legislature creates a commission to regulate the rates of charges, such commission has no power to make a schedule of rates which shall be final and conclusive evidence as to the reasonableness of the charges, because judicial inquiry is thus cut off.

**RAILROADS—REGULATION OF FREIGHTS AND FARES—POWER OF COMMISSION.**—A statute omitting to fix maximum rates of charges for the carriage of freights and passengers by railroads, but creating a commission with authority to make schedules, which shall be *prima facie* evidence of the reasonableness of rates to be charged, is valid.

**RAILROADS—REGULATION OF FREIGHTS AND FARES.**—The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative and not judicial. Independently of constitutional provisions, the legislature has power to regulate freight and passenger charges of railroad companies, and the charges for services of other employments public in character, subject only to such restraints as are imposed by charter, contracts, and by the authority of Congress to regulate foreign and interstate commerce.

**RAILROADS—REGULATION OF FREIGHTS AND FARES BY COMMISSIONERS.**—A statute not attempting to fix freights and fares to be charged by railroad companies, but merely authorizing a board of commissioners to make a schedule of rates which shall be *prima facie* evidence of the reasonableness thereof, is not a delegation to the board of the legislative power to establish such rates, and is not invalid. It leaves the reasonableness of the rates fixed by the commissioners open to inquiry by the courts.

**RAILROADS—CONSTITUTIONAL LAW—REGULATION OF FREIGHTS AND FARES BY COMMISSIONERS.**—A statute making a schedule of rates of freights

and fares to be charged by railroad companies, as fixed by a board of commissioners, *prima facie* evidence that they are reasonable, is not unconstitutional and void as depriving the carrier of property without due process of law, nor as infringing upon the right of trial by jury. The courts have the right to determine the reasonableness of the rates thus fixed, and the statute merely prescribes a rule of evidence.

**CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—Although part of a statute is unconstitutional, the remainder is not to be declared unconstitutional also if the two parts are distinct and separable, so that the latter may stand, though the former is of no effect. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of the part rejected, it must be sustained.

**CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. It may be entirely valid as to some classes of cases, and clearly void as to others.

**CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—When part of a statute relates to the prevention of unjust discrimination between persons and places in rates charged by railroad companies for transportation, and another part relates to the prevention of charges in excess of reasonable rates on transportation wholly within the state, it may be valid as to the latter part, though void as to the former.

**RAILROADS—RIGHT TO REGULATE FREIGHTS AND FARES.**—A statute granting power to a railroad commission to make a schedule of reasonable maximum rates of charges for the transportation of freight and passengers does not impair the obligations of contracts contained in railroad charters providing that the companies may fix such rates in so far as they are not in conflict with the general law of the state. When such schedule is established by the commission, the rates fixed by the railroad companies must conform to its requirements.

**RAILROADS—EVIDENCE OF SCHEDULE OF FREIGHTS AND FARES.**—When a certificate attached to a copy of a schedule of freights and fares prepared by railroad commissioners, shows that the schedule was published for the time required by law, such certificate and copy of the schedule are admissible as *prima facie* evidence of the schedule prepared and adopted by the commissioners.

**CONSTITUTIONAL LAW—RULES OF EVIDENCE SUBJECT TO LEGISLATIVE CONTROL.**—No person or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights or rights subsequently acquired, and changes in them may be made applicable to existing causes of action.

**STATUTE OF LIMITATIONS—PLEADING.**—When an amendment to a declaration sets up no new matter or claim, but merely restates in a different form the cause of action set out in the original declaration, it relates back to the commencement of the suit, and the statute of limitations is arrested at that point. When the amendment introduces a new or different cause of action it is treated as a new suit begun at the time when such amendment is filed.

**STATUTE OF LIMITATIONS—AMENDED PLEADING.**—When an original declaration against a railroad company sought to recover treble damages allowed by statute for a violation of its provisions, and an amended declaration to recover damages against the same company in the same suit for a violation of its common-law liability in charging unreasonable rates is filed after the lapse of more than the period of the statute of limitations from the time of filing the original declaration, a new cause of action is set up, and the statute of limitations applies to the amendment.

**STATUTE OF LIMITATIONS—AMENDED PLEADINGS.**—Although an amendment to a declaration may properly be allowed, it does not necessarily follow that, when allowed, it relates back to the date of bringing the suit, for the purpose of determining questions of limitation. An amendment introducing a new cause of action barred by limitation is ineffectual to avoid the statutory bar.

**STATUTE OF LIMITATIONS—AMENDED PLEADINGS.**—When the original declaration in an action against a carrier sets up overcharges on certain shipments of freight, and the amended declaration sets up such overcharges on other and different shipments, the causes of action are not the same, and the statute of limitations applies to the amendment.

*Herrick and Allen*, for the appellant.

*J. B. Cessne and Willoughby and Barnes*, for the appellee.

<sup>371</sup> **MAGRUDER, J.** The questions presented by this record concern the validity of the system under which for twenty years or more the rates of railroad charges for the transportation of passengers and freight have been controlled and regulated by this state through the medium of a board of railroad and warehouse commissioners.

The principal points, raised by the demurrers to the pleas, by the objections to the introduction of evidence, and by the refusal of instructions, relate to the constitutionality of the act of the legislature of this state, approved May 2, 1873, in force July 1, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal <sup>372</sup> an act entitled 'An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freights on said roads,' approved April 7, A. D. 1871": 2 Starr and Curtis' Ann. Stats. 1961; Rev. Stats. 1885, ch. 114, secs. 124-133, p. 951.

Section 1 provides: "If any railroad corporation, etc., shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation

of passengers or freight, . . . . the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided."

Section 6 provides: "If any railroad corporation shall, in violation of any of the provisions of this act, ask, demand, charge, or receive of any person or corporation any extortionate charge or charges for the transportation of any passengers, goods, merchandise, or property, etc., the person or corporation so offended against may, for each offense, recover from such railroad corporation, in any form of action, three times the amount of the damages sustained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court," etc.

Section 8 is as follows: "The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freights and cars on each of said railroads, and such schedule shall, in all suits brought against such railroad corporations wherein is in any way involved the charges of any such railroad corporation for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, be deemed and taken, in all courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freight and cars upon the railroads for which said schedules may have <sup>373</sup> been respectively prepared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise such schedule. When any schedule shall have been made or revised as aforesaid it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks in some public newspaper published in the city of Springfield, in this state. All such schedules heretofore or hereafter made, purporting to be printed or published as aforesaid, shall be received and held in all such suits as *prima facie* evidence of the schedules of said commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named, and that the same has been published as required by law, stating the

name of the paper in which the same was published, together with the date of such publication."

1. The first ground upon which counsel for appellant attack the act is that it is void for uncertainty in not defining the offenses for which the penalties provided for are imposed. The basis of this attack is found in the words: "If any railroad corporation, etc., shall charge, etc., more than a fair and reasonable rate," etc. It is said that it is uncertain what a fair and reasonable rate is, as the determination of that question will depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.; that the offense of charging more than a fair and reasonable rate can only be defined when the jury, in each particular case, shall decide from the evidence before them what is a fair and reasonable rate; that the statute, being penal in its <sup>374</sup> character, should describe the offense in terms which are free from ambiguity, and that the enforcement of a statute whose meaning is thus doubtful violates that provision in the federal and state constitutions, which declares that no person shall be deprived "of life, liberty, or property without due process of law."

The difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. If the legislature, in the act passed by it, fixes particular rates or charges, strict compliance therewith may work hardship, in view of the impossibility of always providing in advance for the effect of varying circumstances and conditions. The first section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire: *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407; 13 Am. Rep. 457; *New England Exp. Co. v. Maine Cent. R. R. Co.*, 57 Me. 188; 2 Am. Rep. 31; and the court was to judge of the reasonableness of the freight charges: *Gard v. Callard*, 6 Maule & S. 70; *Lowden v. Hierons*, 2 Moore, 102; *Baxendale v. Great Western Ry. Co.*, 5 Com. B., N. S., 330. As common carriers must carry all freight offered to them,



and can only make a reasonable charge for so doing, it follows that the statute is only an expression of what was the law without the statute. Undoubtedly the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges: *Dow v. Beidelman*, 125 U. S. 680. But, in the absence of statutory regulation upon the subject, the courts must decide what is reasonable: *Dow v. Beidelman*, 125 U. S. 680; *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Budd v. New York*, 143 U. S. 517. This being so, we are unable to see how the statute here deprives the appellant of its property without due process of law. If the legislature has failed to fix a reasonable <sup>\$75</sup> rate, then the courts must decide for the railroad companies, when controversies arise, what is a reasonable rate: *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155.

But we held in *Chicago etc. R. R. Co. v. People*, 77 Ill. 443, that the first section of this statute should be construed in connection with the eighth; and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: "When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed. . . . It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates is not the exact form of the statutory offense, and the taking of such higher rates might not subject to the penalties of the statute, upon the making of proof that they were fair and reasonable. Still, as we view it, to constitute the offense really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates." This construction of the two sections, as related to each other, is not forbidden by the character of the act as a penal statute. Although penal laws are to be construed strictly, yet "the object in construing penal, as well as other statutes, is to ascertain the legislative intent": *United States v. Hartwell*, 6 Wall. 395. The statutory counts of the declaration in the case at bar contain an averment that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates. It thus avoids the

defect, for which the declaration in *Chicago etc. R. R. Co. v. People*, 77 Ill. 443, was condemned.

Upon this branch of the case counsel for appellant rely upon the case of *Louisville etc. Ry. Co. v. Railroad Comn. of Tenn.*, 19 Fed. Rep. 679, decided by the circuit court of the <sup>276</sup> United States sitting in Tennessee. But a comparison of the statute of Tennessee, which was under consideration in that case, with the Illinois statute, under which the present suit is brought, will show that they differ from each other in many respects. In *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, the supreme court of the United States passed upon the validity of the statute of Mississippi, passed in 1884, and entitled "An act to provide for the regulation of freight and passenger rates in this (that) state, and to create a commission to supervise the same and for other purposes," which is similar, in many of its essential features, to the Illinois act of 1873. It was objected to the Mississippi act that it was void for want of sufficient certainty; and the case of *Louisville etc. Ry. Co. v. Railroad Comn. of Tenn.*, 19 Fed. Rep. 697, was referred to in support of the objection. But Chief Justice Waite, in delivering the opinion of the court in the Stone case, says of the Mississippi statute: "It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain, as to render it absolutely void on its face. . . . We find nothing in it to show that the statute as it now stands is altogether void and inoperative": See, also, *Stone v. Yazoo etc. R. R. Co.*, 62 Miss. 607; 52 Am. Rep. 193.

We are not convinced that it is our duty to hold said act of 1873 void for uncertainty in defining the offenses, for the commission of which it imposes the penalties therein mentioned. 2. It is claimed that the provision contained in said section 8, which authorizes the commissioners to fix for each of the railroads in the state a schedule of reasonable maximum rates, is unconstitutional, as being an attempted delegation of legislative power.

The constitutional provisions on this subject are as follows: "And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state": Const., art. 11, sec. 12; 1 Starr and Curtis' Ann. <sup>277</sup> Stats., 163. "The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extor-

tion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises": Const., art. 11, sec. 15; 1 Starr and Curtis' Ann. Stats., 164.

The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies, and the charges for services of other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of Congress to regulate foreign and interstate commerce: *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Budd v. New York*, 143 U. S. 517.

This doctrine is not here controverted. It is admitted that if, in the act of 1873, the legislature had prescribed in definite and specific figures, reasonable maximum rates of charges the law would have been valid. By an act, approved April 15, 1871, the legislature of Illinois classified the railroads in the state into four classes, and provided that those in the first class should be limited to two and one-half cents per mile, those in the second to three cents per mile, those in the third to four cents per mile, and those in the fourth class to five and one-half cents per mile, as compensation for the transportation of any person with a certain amount of ordinary baggage: Laws of Ill. 1871, p. 640. We held this law to be valid: *Ruggles v. People*, 91 Ill. 256. The supreme court of the United States affirmed the decision: *Ruggles v. Illinois*, 108 U. S. 526.

The objection made to the act of 1873 is, that it is not such an act as was the act of 1871, which was repealed on <sup>278</sup> March 31, 1874: 2 Starr and Curtis' Ann. Stats., 2368. The act of 1873 is said to be invalid, because, instead of establishing reasonable maximum rates of charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held in a number of cases that statutes, which create boards of commissioners and authorize them to make schedules of rates for railroad companies, are not invalid for the reason here urged. The doc-

trine of these cases is that the functions of such boards are administrative rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end, and that, as the reasonableness of rates changes with circumstances, and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the legislature from the use of the agencies necessary to perform the duty imposed upon it by the constitution; in short, that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself: *State v. Chicago etc. Ry. Co.*, 38 Minn. 281; *Georgia R. R. Co. v. Smith*, 70 Ga. 694; *Tilley v. Savannah etc. R. R. Co.*, 5 Fed. Rep. 641; *Chicago etc. Ry. Co. v. Dey*, 35 Fed. Rep. 866; *State v. Fremont etc. R. R. Co.*, 22 Neb. 313; *State v. Fremont etc. R. R. Co.*, 23 Neb. 117; *People v. Harper*, 91 Ill. 357; 8 Am. & Eng. Ency. of Law, 911.

In *State v. Chicago etc. Ry. Co.*, 38 Minn. 281, the eighth section of the Minnesota statute, which was there held to be constitutional, provided that the railroad and warehouse commission should have the power, in case the tariffs of rates, fares, charges, or classification, filed and published by the railroad companies, should be unreasonable, to change them, and make them reasonable, and compel the carriers to adopt them as thus changed, and, upon refusal, to enforce compliance <sup>379</sup> by *mandamus*; and said section also declared that it should be unlawful for any common carrier to charge a higher or lower rate than that fixed and published by the commission.

In that case the supreme court of Minnesota interpreted the eighth section to mean that the rates, recommended and published by the commission in the manner required by the act, were not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what were lawful or equal and reasonable rates, and that, in proceedings to compel compliance, no issue could be made or inquiry had as to the equality and reasonableness of the rates in fact. It was there conceded by counsel that the legislature could declare the schedule of rates fixed by the commission to be *prima facie* evidence of what was equal and reasonable, but the court held that the legislature had the power to create a

commission whose judgment or determination as to what was reasonable should be final and conclusive. The Minnesota case was taken to the supreme court of the United States, and the judgment therein rendered was reversed, upon the ground that the Minnesota statute, as construed by the supreme court of that state, conflicted with the constitutional provision forbidding the states to deprive persons of their property without due process of law: *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418. In the latter case Mr. Justice Blatchford, in delivering the opinion of the court, said of the statute: "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." From this decision Justices Bradley, Gray, and Lamar dissented, and held, in their dissenting opinion, that<sup>340</sup> there was no good reason why the legislature might not delegate the duty of regulating and fixing the charges, so as to make them equal and reasonable, to such a board of commissioners as was provided for in the Minnesota statute.

Subsequently, in the case of *Budd v. New York*, 143 U. S. 517, the case of *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, was reviewed and explained; the doctrine of *Munn v. Illinois*, 94 U. S. 113, and of the other cases known as the *Granger cases*, 94 U. S. 155-181, was adhered to; and it was held that the Minnesota law had been declared invalid because it had been construed by the supreme court of that state "as providing that the rates of charges for the transportation of property by railroads, recommended and published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates."

We understand the doctrine of *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, and of *Budd v. New York*, 143 U. S. 517, to be as follows: The legislature has the power to directly fix the rates of charges. It has the right to declare what is reasonable. When it does so, its declaration is conclusive as to the reasonableness of the rates, and a charge beyond the maximum fixed by it must be regarded as unreasonable. But,

where the legislature creates a commission to regulate the rates of charges, such commission has no power to make a schedule of rates which shall be final and conclusive evidence as to the reasonableness of the charges, because judicial inquiry is thereby cut off.

We do not, however, understand the federal cases to hold that an act of a state legislature may not be valid, if, while omitting to itself fix the maximum rates, it creates a commission with authority to make schedules which shall be *prima facie* evidence of the reasonableness of the rates. Where the schedule is only made *prima facie* evidence, the court, in a suit against the carrier, can inquire and determine what is a <sup>281</sup> reasonable rate; and the defect which was found to exist in the Minnesota law is thus obviated. Such is the character of the Illinois act of 1873, which provides, in section 8, that the schedule made, published, and certified by the commissioners, shall, in all suits brought against the railroad corporations involving their freight and passenger charges, etc., be "deemed and taken, in all courts of this state, as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges," etc.

One of the criticisms made upon the construction given by the supreme court of Minnesota to the statute in that state is expressed in *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, in the following words: "The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable." The Mississippi statute which was held to be a valid law in *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, contained a provision that the determination of the commissioners should be received in the courts as *prima facie* evidence that such determination was right and proper. So, also, the Iowa statute, which was held not to be unconstitutional as a delegation of legislative power in *Chicago etc. Ry. Co. v. Dey*, 35 Fed. Rep. 866, provided that the schedule made by the commissioners should be *prima facie* evidence of the reasonableness of the rates therein charged in all suits brought against the railroad corporations.

Under the constitutional provisions above quoted the legislature of this state has the right, and it is its prerogative



if it chooses to exercise it, to pass a law establishing or fixing reasonable maximum rates of charges. When it passed the act of 1873 it did not choose to exercise the power thus conferred upon it. That act does not establish reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners the power to establish such rates. <sup>382</sup> When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But "when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable": *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 462.

The decision in *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, does not base the invalidity of the Minnesota statute upon the ground that the provision, making the schedule of the commission final and conclusive as to the reasonableness of the rates, was a delegation of legislative power to the commission. Nor do we deem it necessary to decide whether such a provision would amount to a delegation of legislative power or not. But if it be conceded that making the schedule of the commission final and conclusive as to the rates is a delegation of legislative power it is sufficient to say in the present case that the act of 1873 does not give to the schedule any such final and conclusive effect. We are, therefore, of the opinion that the act is not unconstitutional, for the second reason urged upon our attention by counsel.

3. It is argued that the provision of the statute making the schedule of the commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but <sup>383</sup> as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place,



the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence: 2 Rice on Evidence, 806, 807; *Commonwealth v. Williams*, 6 Gray, 1; *State v. Hurley*, 54 Me. 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury, caused by sparks from a locomotive passing along the road, *prima facie* evidence of negligence, and no question has ever been raised as to the validity of the statute: *Pittsburgh etc. Ry. Co. v. Campbell*, 86 Ill. 443; *St. Louis etc. R. R. Co. v. Funk*, 85 Ill. 460; *Toledo etc. Ry. Co. v. Larmon*, 67 Ill. 68; *Rockford etc. R. R. Co. v. Rogers*, 62 Ill. 346; *Chicago etc. R. R. Co. v. Clampit*, 63 Ill. 95; *Chicago etc. R. R. Co. v. Quaintance*, 58 Ill. 389.

Acts making tax deeds *prima facie* evidence of the regularity of proceedings antecedent to the deed have been held to be valid: 2 Rice on Evidence, 607; *Hand v. Ballou*, 12 N. Y. 541; *Delaplaine v. Cook*, 7 Wis. 54; *Allen v. Armstrong*, 16 Iowa, 508; *Wright v. Dunham*, 13 Mich. 414; *Gage v. Caraher*, 125 Ill. 451. See, also, *Williams v. German Mut. Fire Ins. Co.*, 68 Ill. 387. Cases referred to by counsel which involve the validity of acts providing for references to auditors or referees, and making the finding of the facts by them in their reports *prima facie* evidence of facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The supreme court of Iowa has decided that a provision making the schedule of the commission *prima facie* evidence of the reasonableness of the rates of charges, as contained in a statute of that state similar to said act of 1873, was not obnoxious to the objections here urged against it, saying: "The provision of the statute that the rates fixed by the commissioners shall be regarded as *prima facie* reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceedings under the laws of the state. The law presumes the acts of officers of the state to be rightly done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff": *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 81

Am. St. Rep. 477. See, also, *Chicago etc. R. R. Co. v. People*, 67 Ill. 11; 16 Am. Rep. 599.

4. It is contended that the statute has been held to be unconstitutional as to interstate shipments, and that, therefore, it is void as a whole.

This contention is based upon the decisions of this court in *People v. Wabash etc. Ry. Co.*, 104 Ill. 476, and *Wabash etc. Ry. Co. v. People*, 105 Ill. 236, and of the supreme court of the United States in *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557. In the Illinois cases the action was to recover for unjust discrimination in carrying the same class of freight from Peoria to New York city for a less sum of money than similar freight was carried from Gilman to New York city, Peoria being a greater distance from New York than Gilman, and being eighty-six miles farther west in Illinois upon the defendant company's road, from a station near the eastern boundary of Illinois than Gilman. The judgments in the Illinois cases were reversed by the United States supreme court in *Wabash Ry. Co. v. Illinois*, 118 U. S. 557, because of the interpretation placed by this court upon those sections of the act of 1873 which relate to unjust discrimination; and not because the United States supreme court considered the act of 1873 invalid as amounting to an attempted regulation of commerce. The latter court in *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557, said: "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other <sup>285</sup> class of transportation than that which begins and ends within the limits of the state."

The question whether the Illinois statute was or was not so designed by its framers was not as carefully considered in the above cases as it would have been had it not been for the construction therein placed upon the previous decisions of the federal supreme court. The latter decisions were then understood as holding that a state law, prohibiting unjust discrimination in the rates of charges for the transportation of property between points wholly within the state, whether it was a part of a continuous carriage to a point out of the state or not, was not invalid, in the absence of congressional action upon the subject, and when construed as the act of 1873 was construed in the Illinois cases. With such understanding of the federal rulings this court held that while the provisions of the act of 1873 relating to unjust discrimi-

nation were inoperative upon that part of the contract of shipment which had reference to the transportation outside of the state, they were binding and effectual as to so much of the transportation as was within the limits of the state. In the opinion of the majority of the court (Chief Justice Waite and Justices Bradley and Gray dissenting), in *Wabash etc. Ry. Co. v. Minn.* 113 U. S. 557, Mr. Justice Miller said: "It cannot be denied that the general language of the court in these cases, upon the power of Congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it." In the same opinion the same learned justice, in speaking for the majority, while stating that they were bound by the construction given by this court to the Illinois statute, and that this court had so construed the statute as to make it apply to commerce among the states, also said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." Looking, however, at the provisions <sup>286</sup> of the act of 1873, which have reference to unjust discrimination, in the light of the construction given to them in the Illinois cases above referred to, the federal supreme court held those provisions invalid, as applied to unjust discrimination in the rates of charges for the transportation of property within the state when such transportation was part of a continuous carriage from a point within to a point without the state, upon the ground that such construction made the provisions conflict with the constitutional grant to Congress of power to regulate interstate commerce.

This court might be inclined to consider the question whether the construction, announced in said cases and accepted by the United States supreme court, may not have been incorrect and unauthorized by the language of the act, if the present suit had arisen under those sections of the act which have reference to unjust discrimination. But the case at bar arises under the provisions which prohibit the charge of more than fair and reasonable rates. This action is brought for damages growing out of alleged charges of unreasonable rates for the transportation of property between points lying wholly within the state, and not being part of a continuous transportation to any point outside of the state. It is within

the power of the legislature to so amend the act as clearly to limit the provisions concerning unjust discrimination to commerce carried on within the state.

Counsel claim that the provisions relating to interstate commerce are so intimately connected with those relating to commerce carried on wholly within the limits of the state, as not to be separable the one from the other; and that, as the act has been declared invalid when applied to interstate commerce, it must also be considered invalid as applied to state commerce. Upon this point reference is made to cases holding that words of limitation cannot be introduced into a penal statute, so as to make it specific, when, as expressed, it is general only: *United States v. Reese*, 92 U. S. 214; *Trademark* <sup>287</sup> cases, 100 U. S. 82; *Baldwin v. Franks*, 120 U. S. 678. If the doctrine of these cases is applicable to the case at bar it is only applicable to the sections of the act of 1873 relating to unjust discrimination; and the effect of its application would be to hold those sections void, as affecting transportation within the state, because they had been held void as affecting interstate transportation; but the effect would not be to invalidate the act so far as it relates to charges of fair and reasonable rates alone.

Where a part of a statute is unconstitutional, the remainder will not be declared to be unconstitutional also, if the two are distinct and separable, so that the latter may stand, though the former becomes of no effect. The constitutional and unconstitutional provisions may sometimes be contained in the same section, but do not necessarily fall together, unless they "are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. . . . If a statute attempts to accomplish two or more objects, and is void as to one, it may still be, in every respect, complete and valid as to the other. . . . A legislative act may be entirely valid as to some classes of cases, and clearly void as to others": Cooley on Constitutional Limitations, 6th ed., 211, 213; *Dupae v. Swigert*, 127 Ill. 494.

An examination of the act of 1873, in the light of these principles of construction, will show that parts of the act relate to the prevention of unjust discrimination between

persons and places in the rates of charges for transportation, while other parts relate to the prevention of charges that exceed fair and reasonable rates. Sections 2 and 3 of the act relate more particularly to unjust discrimination, and their aim is "against favoritism—against charging one shipper more than another for the like service, under like conditions": <sup>388</sup> *Indianapolis etc. R. R. Co. v. Ervin*, 118 Ill. 250; 59 Am. Rep. 369; *Illinois Cent. R. R. Co. v. People*, 121 Ill. 304. Section 1, in connection with sections 7 and 8, concerns the question whether the rate charged a passenger or shipper is reasonable or not, irrespective of the charge that may be made against another passenger or shipper, or at another point. It is easy to see that there is a difference between extortion and discrimination. Hence, we think that the provisions of the act upon the two subjects can be separated and disconnected from each other, so that those portions relating to reasonable charges may stand, even if those portions relating to unjust discrimination fall. Whether the latter do or must fall or not we do not decide. It is to be noted, however, that in *Indianapolis etc. R. R. Co. v. Ervin*, 118 Ill. 250, 59 Am. Rep. 369, and *Illinois Cent. R. R. Co. v. People*, 121 Ill. 304, this court treated the whole of the act of 1873 as valid, as applied to commerce wholly within the state.

The Wabash Railway cases, 104 Ill. 476, and 105 Ill. 236, arose under the sections relating to unjust discrimination, and it was those sections which were therein construed as being "broad enough to include unjust discrimination in the rates of charges for the transportation of property from a point within to a point without the state." The provisions of the act relating to fair and reasonable rates were not construed as being broad enough to prohibit charges of more than reasonable rates for transportation outside of the state, or within it as part of a carriage beyond the state. Therefore, the question whether these provisions were intended to apply only to transportation between points lying wholly within the state, and disconnected from a continuous carriage to a point outside of the state, is not a question which is settled by the decisions in the Wabash Railway cases. After a careful study of the terms of the act we are of the opinion that the first section, read in connection with the title and sections 7, 8, and 11, applies only to charges of reasonable rates for such transportation within the state as is not a part of a continuous transportation <sup>389</sup> without the state, and therefore

does not infringe upon the power of Congress to regulate interstate commerce.

The title of the act is "An act to prevent extortion . . . . in the rates charged for the transportation of passengers and freights on railroads in this state," and not on railroads outside of this state. The railroad corporations forbidden by section 1 to charge more than reasonable rates are thus therein described: "Any railroad corporation organized or doing business in this state under any act of incorporation, or general law of this state, now in force or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other state, and doing business in this state." Section 11 provides that the term "railroad corporation," contained in the act, shall be taken to mean all corporations, etc., now or hereafter owning or operating "any railroad, in whole or in part, in this state," and to apply to all persons, whether incorporated or not, "that shall do business as common carriers upon any of the lines of railways in this state," etc. Section 1 forbids the charging of more than a reasonable rate for the transportation of passengers or freight or cars "upon any railroad within this state."

Section 8 directs the railroad and warehouse commissioners to make "for each of the railroad corporations doing business in this state," a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars "on each of said railroads." It is quite manifest that the schedule thus required to be made is of more importance in determining what are reasonable rates of charges than in determining whether there has been unjust discrimination. In section 3 the discriminating rates, charges, etc., therein referred to are made *prima facie* evidence of unjust discrimination without mention of the schedule. If the greater distance from Peoria to New York and the shorter distance from Gilman to New York are given, and the fact is ascertained that the charge for transportation over such greater <sup>390</sup> distance is less than the charge therefor over such shorter distance, a discrimination is at once established, whether the whole of the distances be regarded, or the proportional parts thereof in this state. Given the facts of the distances, whether without or within the state, and of the actual charges, and the question of discrimination is determined, though reference to the schedule may be made as to

the injustice of the discrimination to the individual. But it could not have been the intention of the legislature that this schedule should be *prima facie* evidence of what were reasonable maximum rates of charges for transportation outside of the state, or for such transportation within it as might be part of a continuous transportation from within to without. Other states would have their own laws, and commissioners, and methods of ascertaining rates. The railroad and warehouse commissioners named in schedule 8 are Illinois officials, appointed by the governor, with jurisdiction limited to this state, and without power or opportunity to gather the data for fixing reasonable rates of transportation outside of the state, or within the state as connected with a continuous carriage to a point beyond its limits. The act establishing the board of railroad and warehouse commissioners provides that only railroads incorporated or doing business in this state shall make sworn statements of their affairs to said commissioners. (2 Starr and Curtis' Ann. Stats. 1956-1958.) Section 7 of the act of 1873 requires the commissioners to ascertain whether the provisions of the act have been violated by "any railroad corporation in this state," and for that purpose "to visit the various stations upon the line of each railroad." We construe these features of the act to indicate that so far as the provisions relating to the charges of reasonable rates are concerned it was not the intention of the legislature to make them apply to any other kind of transportation than that which should occur wholly within the boundaries of this state, or to any other kind of contracts than those for a carriage which begins <sup>291</sup> and ends within the state, disconnected from a continuous transportation through or into other states. Consequently, we hold the provisions relating to charges of reasonable rates to be valid.

5. The statute granting power to the railroad commissioners to make a schedule of reasonable maximum rates for appellant is alleged to be a violation of appellant's charter, so as to impair the obligation of its contract with the state; and, therefore, the act is said to be void as to appellant.

This point is settled adversely to appellant by the cases of *Ruggles v. People*, 91 Ill. 256, and *Ruggles v. Illinois*, 108 U. S. 526. In the former case one of the questions submitted by the stipulation was whether a law establishing a reasonable maximum rate of charges for the transportation of passengers on railroads in this state was such a constitutional law as



appellant "was bound to obey, . . . notwithstanding the provisions of its charter"; and it was there held that the law was valid, and that the legislature has the power to fix a maximum rate of charges for corporations exercising a business public in its character; and that such regulation does not impair the obligation of the contract in their charters. In *Ruggles v. Illinois*, 108 U. S. 526, the provisions of appellant's charter are fully set out.

It is not denied that, by consolidation and statutory provisions, appellant acquired the powers and franchises granted to the Central Military Tract Company by an act to incorporate the latter company, passed on February 15, 1851, and by an act to amend said act, passed on June 19, 1852. By section 3 of said act of 1851 said company was thereby "created and incorporated for the purpose of organizing under an act entitled 'An act to provide for a general system of railroad incorporations,' in force November 5, 1849," and was "entitled to have and exercise the powers and privileges, and be subject to the liabilities therein enumerated." The general law of 1849, in clause 10 of section 21 thereof, conferred <sup>392</sup> upon railroad companies organized thereunder the right "to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided." It also provides in section 32 that "the legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such roads; but the same shall not, without the consent of the corporation, be so reduced as to produce, with said profits, less than fifteen per cent per annum on the capital actually paid in, nor unless, on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company from all sources for the year then last past, shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in."

Section 6 of the act of 1852 is as follows: "The said company shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the

provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: *Provided*, that the same be not repugnant to the constitution and laws of the United States or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall, from time to time, by their by-laws, determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said road, shall be ~~and~~ in conformity to such rules and regulations as the said board of directors shall from time to time determine."

It is now claimed by the appellant that it still has the right, under its original charter of 1851, of fixing rates subject only to a limit of three cents a mile on passengers, and that the state has no power to interfere except to keep the annual profits down to fifteen per cent per annum on the paid-up capital; and that the act of 1873 giving the commissioners power to make a schedule of maximum reasonable rates for appellant ignores these limitations upon the power of the state to regulate its charges. Although the act of 1852 is entitled an act to amend the charter of 1851 it is a complete charter in itself. It contains provisions not found in the General Railroad Law of 1849. The plea alleges that it was accepted by appellant, and it was evidently intended and accepted as a substitute for the charter of 1851.

In *Ruggles v. Illinois*, 108 U. S. 526, it was contended by appellant that the act of 1852 repealed sections 21 and 32 of the old charter, with the limitations therein contained as above set forth, and that under section 6 of the amending act of 1852, as above set forth, appellant could establish its own rates of fare and freight, free from legislative interference. In that case the supreme court of the United States declined to decide whether section 6 of the amending act repealed clause 10 of section 21 and section 32 of the original charter or not; but they held that under said section 6 no by-law could be established by the directors that did not conform to the laws of the state, whether such laws were in force when the amended charter was granted or came into operation afterwards; that the power of the company for the regulation of its own affairs was in express terms subjected to the legislative control of the state; that the by-laws fixed

the rates, and no by-law could be made that was at all repugnant to the laws of the state; that only such charges could be collected by appellant <sup>394</sup> as were allowed by the laws of the state; that in the absence of legislation the power of the directors over the rates is subject only to the common-law limitation of reasonableness, but that the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property; that, when a maximum is so established, the rates fixed by the directors must conform to its requirements, otherwise the by-laws would be repugnant to the laws. Adopting the views thus expressed by the federal supreme court we are of the opinion that there is nothing in appellant's charter which relieves it from the obligation to submit to the provisions of the act of 1873, upon the subject of reasonable rates, and that the act does not impair the obligation of any contract alleged to be contained in appellant's charter.

6. It is claimed that the schedule of 1873, which was admitted in evidence, was not published as required by statute, and that for that reason it did not go into effect.

The copy of the schedule of September 1, 1873, introduced by the plaintiff, was accompanied by the following certificate, which was attached to it:

“ Office of        •  
“ RAILROAD AND WAREHOUSE COMMISSION,  
“ Springfield, Illinois.

“ STATE OF ILLINOIS,        }  
“ Sangamon County.        } ss.

“ We, the undersigned, railroad and warehouse commissioners in and for the state of Illinois, do hereby certify that the foregoing is a true copy of ‘a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars,’ together with a classification of freight explanatory and forming a part of said schedule, revised and prepared by the railroad and warehouse commission for the Chicago, Burlington, and Quincy company; that said ‘classification of freight’ and schedule has been published, as required by law, in the *Illinois State Journal*, a weekly newspaper published in the city of Springfield, in said state, in the issues <sup>395</sup> of said paper, dated respectively September 3d, 10th, 17th, and 24th, and October 1, A. D. 1873, as revised, and was in force from and after Septem-

ber 1, A. D. 1873, and remained in force until December 1, A. D. 1881.

"Witness our hands this 7th day of February, A. D. 1891.

"JOHN R. WHEELER,

"ISAAC N. PHILLIPS,

"W. R. CROM,

"Railroad and Warehouse Commissioners.

"Attest: J. H. PADDOCK, Secretary."

This certificate shows that publication of both the classification and the schedule was made not only for three successive weeks, but for five successive weeks, and that, consequently, the provision in section 8 as to publication was fully complied with. The trial court was authorized to admit it, and when admitted, it was "*prima facie* evidence of the schedules of said commissioners." At the close of plaintiff's evidence, defendant introduced another certificate of the commissioners, dated December 1, 1891, and other evidence, for the purpose of showing that the classification of freights, which recited on its face that it formed a part of each schedule was published on September 3d, 10th, and 17th, and that the schedule for appellant, which refers to the classification as forming a part of it, was published on September 17th and 24th and on October 1st. The classification was published three successive weeks, and the schedule was published three successive weeks, but the point is made that, as the schedule referred to the classification, the latter was a part of the former, and that, when the schedule was published on September 17th, 24th, and October 1st, the classification should have been published as a part of it and in the same issues of the newspaper with it. As the classification was for all the railroads, and a schedule was made for each, it is a question whether it was necessary to republish the classification with each schedule, it having already been published for the time required by law. The classification <sup>398</sup> was on file in the office of the commissioners, and the schedules referred to it, and the roads could have access to it.

The certificate, however, as above set forth, was merely *prima facie* evidence that the schedule introduced was that of the commissioners. Other evidence might be introduced to show that it was their schedule. This evidence was furnished by the defendant itself. Its own proof showed that the copy introduced was a copy of the schedule, prepared and adopted for it by the commissioners. It is not contended

that the defendant did not have notice of the schedule of September, 1873, irrespective of any publication of it.

But, even if it be true that the schedule could not go into effect until it was published in the manner required by the law, and that the separate publication of the classification and the schedule was not a compliance with section 8, we still think that the certificate above set forth was sufficient. The case below was not tried until November 30, 1891. By act approved June 30, 1885, the legislature amended said section 8, and, in the amended section, provided as follows: "All such schedules heretofore or hereafter made shall be received and held in all such suits as *prima facie* the schedules of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named": 3 Starr and Curtis' Ann. Stats. 1029. The certificate of February 7, 1891, conforms to the requirement of section 8 as thus amended.

No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights or rights subsequently acquired. Changes in them may be made applicable <sup>397</sup> to existing causes of action: Cooley's Constitutional Limitations, 6th ed., 451; *Gage v. Caraher*, 125 Ill. 447.

7. Appellee assigns as a cross-error the overruling of his demurrer to the sixth plea of the defendant. This plea was to the last additional count of the amended declaration, and averred that the causes of action therein set out did not accrue to the plaintiff within five years next before the filing, or the obtaining of leave to file, said last additional count, or the substitute therefor. The question is, whether the amendment, or the last count of the amended declaration, sets up a new cause of action. If it does, the demurrer to the plea was properly overruled; if it does not, the amendment takes effect from the commencement of the suit. Where an amendment sets up no new matter or claim, but merely restates, in a different form, the cause of action set out in the original declaration, it relates to the commencement of the suit, and the

statute of limitations is arrested at that point; but, where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date: *Baker v. Missouri Pac. Ry. Co.*, 34 Mo. App. 98.

In this case the two counts of the original declaration, and all the additional counts of the amended declaration except the last, sought to recover the treble damages allowed by the statute for a violation of its provisions; and to these counts the two years' statute of limitations was properly pleaded, as, in this state, actions for a statutory penalty must be brought within two years next after the cause of action accrued. The last amended count, filed more than seven years after the filing of the original declaration, sought to recover damages for the violation of defendant's common-law liability as a carrier, for charging more than reasonable rates. To this count the five years' statute of limitations was applicable. It is conceded by appellee that he cannot recover treble damages for unreasonable charges, except for those paid by him during <sup>398</sup> the two years prior to the beginning of the suit, and that the object of the amended count is to recover single damages for the three years immediately preceding the two years for which treble damages are claimed.

We think that the amended count introduced a new cause of action. The original declaration declares specially on the statute for the recovery of a statutory penalty; alleges, as the ground of action, the charge of rates in excess of those fixed by the schedule of the commissioners, and concludes: "Whereby and by force of the statute . . . . an action hath accrued . . . . to demand and recover of the defendant three times the amount of said sum of money, etc., with reasonable attorneys' fees in a sum to be fixed by the court." The amended count is based on an alleged common-law liability, or on an implied contract to repay money obtained by wrongful overcharges. Before it was filed the cause of action set forth in it had been barred by the five years' statute of limitations. If a new suit had been begun for the same cause of action at the time of the amendment it could not have been maintained; and there is no more reason why the cause of action should be enforced when embodied in an amended declaration than when forming the subject matter of a new suit. Although an amendment may properly be allowed it does not necessarily, when allowed, have the effect of relating

back to the date of bringing the suit, for the purpose of determining questions of limitation. An amendment, which introduces a cause of action barred by limitation, is ineffectual to avoid the statutory bar: *Gibbons v. Steamboat*, 40 Mo. 253; *Baker v. Missouri Pac. Ry. Co.*, 34 Mo. App. 98; *Gorman v. Judge etc.*, 27 Mich. 138; *Melvin v. Smith*, 12 N. H. 462; *Illinois etc. R. R. & Coal Co. v. People*, 19 Ill. App. 141.

Where the original declaration sets up overcharges upon certain shipments, and the amended declaration sets up overcharges on other and different shipments, the causes of action are not the same: *Illinois Cent. R. R. Co. v. Cobb*, 64 <sup>399</sup> Ill. 140; *Phelps v. Illinois Cent. R. R. Co.*, 94 Ill. 548; *North Chicago Rolling Mill v. Monka*, 107 Ill. 340. Here the original declaration seeks to recover penalties for overcharges on shipments made subsequent to November 2, 1880, while the last additional count of the amended declaration declares for damages on account of overcharges on shipments made prior to October 17, 1880.

We are of the opinion that there was no error in overruling the demurrer to the sixth plea.

One or two other minor objections are urged, but, after a careful consideration of them, we are satisfied that they are not well taken. The judgment of the circuit court is affirmed.

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**CARRIERS—DUTY TO CARRY.**—A common carrier is bound to convey the goods of any person offering to pay his hire unless his carriage is already full, or the risk sought to be imposed on him is extraordinary, or unless the goods offered are different from those usually carried by him: *Fish v. Chapman*, 2 Ga. 349; 46 Am. Dec. 393. A carrier must receive all freight that may be offered and within a reasonable time, and in the order in which it is offered transport it to the point designated by the owner: *Bullentine v. North Missouri R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315, and note. A carrier is bound to receive goods and carry them safely or answer for the loss: *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note; *Doty v. Strong*, 1 Pinn. 313; Burn. 158; 40 Am. Dec. 773. See, also, the notes to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 647; *Sandford v. Catawissa etc. R. R. Co.*, 64 Am. Dec. 671, and *Kansas Pac. Ry. Co. v. Nichols*, 12 Am. Rep. 501.

**RAILROADS.—POWER OF STATE TO REGULATE RATES FOR CARRIAGE:** See *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477, and note, with the cases collected; and the extended note to *People v. Budd*, 15 Am. St. Rep. 490.

**STATUTES VOID IN PART.**—The unconstitutionality of one portion of a statute cannot defeat other portions unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute: *McPherson v. Blacker*, 92 Mich. 377; 31 Am. St. Rep. 587, and note. But the invalidity of one provision in a statute, the different parts of which must be construed together as dependent provisions, renders the whole act invalid:



*Wadsworth v. Union Pac. Ry. Co.*, 18 Col. 600; 36 Am. St. Rep. 309, and note.

**EVIDENCE.—POWER OF LEGISLATURE OVER RULES OF:** See extended note to *People v. Cannon*, 36 Am. St. Rep. 682, 686, and the notes to *In re Wright*, 31 Am. St. Rep. 104, and *Burlington etc. Ry. Co. v. Dey*, 31 Am. St. Rep. 501; and see, also, *O'Bryan v. Allen*, 108 Mo. 227; 32 Am. St. Rep. 595.

**RAILROAD COMMISSION.—POWER OF STATE TO ESTABLISH.**—The legislature has power to delegate authority to a commission to provide reasonable rules and regulations in respect to fixing reasonable freight and passenger tariffs by railroads and other carriers, to prevent unjust discriminations and preferences, and to regulate other matters pertaining to transportation within the state subject to the right of appeal to the courts: *Atlantic Express Co. v. Wilmington etc. R. R. Co.*, 111 N. C. 463; 32 Am. St. Rep. 805, and note, with the cases collected.

## COHN v. PEOPLE.

[149 ILLINOIS, 493.]

**CONSTITUTIONAL LAW—STATUTES—TITLE, WHAT MAY BE EMBRACED IN LOCAL AND SPECIAL LAWS.**—A statute entitled "An act to protect associations, unions of workmen, and persons in their labels, trademarks, and forms of advertising," does not violate a constitutional provision that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title; nor is such statute obnoxious to a constitutional provision prohibiting the passage of local or special laws, and the granting of special privileges.

**CONSTITUTIONAL LAW—STATUTES—TITLE—WHAT MAY BE EMBRACED IN ACT.**—Under a constitutional provision that statutes shall not embrace more than one subject, and that shall be embraced in its title, there may be included in a statute means reasonably adapted to secure the objects indicated by the title. When the general purpose is declared in the title the means for its accomplishment provided by the act are presumed to be intended as necessary incidents.

**CONSTITUTIONAL LAW—STATUTES—TITLE HOW FAR CONTROLS.**—When, by virtue of constitutional provisions, the legislature must prepare and adopt the title to each law passed, to the end that such title shall express the general purposes of the act, the title cannot be resorted to to extend or restrain any positive provision in the law itself.

**CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION—RESORT TO TITLE.**—In the construction of a statute the intention of the lawmakers is to be found and given effect. When there is otherwise doubt or obscurity in the act resort may be had to its title to enable the court to discover the intent, and remove what might otherwise be uncertain or ambiguous.

**TRADEMARKS—WHETHER LAWFUL.**—A cigar label reading as follows: "This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship," is not unlawful as transgressing the rules of morality and public policy, and may be legally adopted.

**TRADEMARKS—WHETHER LAWFUL.**—A party may, without condemning or aspersing the product of other manufacturers, adopt a trademark commendatory of the article he has for sale, or he may lawfully procure the certificate of others as to the quality of the article he places upon the market, without transgressing the rules of morality or public policy.

*Reed, Brown, and Allen*, for the appellant.

*M. T. Moloney*, attorney general, *T. J. Scofield*, and *M. L. Newell*, for the people.

438 SHOPE, J. This was a prosecution of the plaintiff in error for the violation of section 2 of an act entitled "An act to protect associations, unions of workingmen, and persons in their labels trademarks, and forms of advertising," in force July 1, 1891. Before a justice of the peace he was found guilty and a fine imposed. On appeal to the criminal court by the defendant a trial was had by jury, resulting in a verdict of guilty, and a judgment for one hundred dollars fine and costs rendered.

Section 1 of the act under consideration provides: "Whenever any person, association, or union of workingmen have adopted, or shall hereafter adopt, for their protection, any label, trademark, or form of advertisement announcing that goods to which such label, trademark, or form of advertisement shall be attached, were manufactured by such person or by a member or members of such association or union it shall be unlawful for any person or corporation to counterfeit 439 or imitate such label, trademark, or form of advertisement. Every person violating this section shall, upon conviction, be punished by imprisonment in the county jail for not less than three months nor more than one year, or by a fine of not less than one hundred dollars, nor more than two hundred dollars, or both." Section 2 is as follows: "Every person who shall use any counterfeit or imitation of any label, trademark, or form of advertisement of any such person, union, or association, knowing the same to be counterfeit or imitation, shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a term of not less than three months nor more than one year, or by a fine of not less than one hundred dollars nor more than two hundred dollars, or both": Laws of 1891, p. 202.

The plaintiff in error was a dealer in cigars, and it is shown that certain witnesses produced applied to him for the purchase of cigars by the box; that they objected to purchasing

unless there were upon the boxes what were known as the "Union Labels"; that there were no such labels upon the boxes produced by the plaintiff in error and offered to be sold. The plaintiff in error thereupon took these boxes of cigars, went into the back part of his store, and returned with boxes having labels on them. The witnesses then paid for them and took them away. The boxes were produced and identified as being those sold to the witnesses by plaintiff in error, and upon each of which was a label purporting to be the label of the Cigar Makers' International Union of America. This label is a small blue paster, on which is printed the following:

"This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship. Therefore, we recommend these cigars to all smokers throughout the world. All infringements upon this label will be punished according to law.

"A. STRASSER, Pres. C. M. I. U. of America."

490 It is shown that the labels are issued by the association to its members bearing the local stamp and factory number of the particular factory to which they are issued. It was shown that the labels upon the boxes purchased by the witnesses from Cohn were counterfeit imitations of the labels issued by the Cigar Makers' International Union of America. To prove the adoption of this trademark by the Cigar Makers' International Union of America, the people introduced in evidence a certificate of the secretary of state, under his hand and seal, issued in conformity with the provisions of section 3 of the act under consideration. That section provides that every person, association, or union of workingmen that has heretofore adopted or shall hereafter adopt a label, trademark, or form of advertisement, as aforesaid, may file the same for record in the office of the secretary of state, by leaving two copies, counterparts or *fac similes* thereof, with the secretary of state, and the secretary shall deliver to such person, association, or union so filing the same a duly attested certificate of the record of the same. It is then provided that "such certificate of record shall, in all suits and prosecutions under this act, be sufficient proof of the adoption of such label, trademark, or form of advertisement, and of the right of said person, association, or union to adopt the same." It was

proved that the Cigar Makers' International Union of America was an association of workingmen—of cigarmakers; that the cigars sold by Cohn were manufactured by Gustave Eddelstone; that at the time he sold the cigars to Cohn Brothers, of which firm plaintiff in error was a member, there were no blue labels on the boxes, and none were delivered with the cigars; that they were not made by a union factory.

It is objected that the evidence was insufficient to warrant the verdict. It need only be said that there was evidence sufficient to justify the jury in finding the defendant guilty of using a counterfeit or imitation label, within the meaning of section 2 of the act before quoted.

<sup>491</sup> It is next insisted that the statute is in violation of section 13 of article 4 of the constitution, providing that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title of the act is, "An act to protect associations, unions of workingmen, and persons in their labels, trademarks, and forms of advertising." It is said by counsel that while there are provisions of the act designed to protect trademarks, the provisions of sections 1, 2, 4, 6, and 7 relate to the punishment of imitators or counterfeiters, and those using such imitations and counterfeits, and are not enacted for the protection of the owners of the labels, trademarks, or forms of advertising, and therefore are not within the title of the act. As said in *Larned v. Tiernan*, 110 Ill. 177: "The decisions concur in laying down substantially the rule that in consistency with that provision there may be included in an act means which are reasonably adapted to secure the objects indicated by the title": See cases there cited. When the general purpose is declared in the title the means for its accomplishment provided by the act will be presumed to be intended as a necessary incident: *O'Leary v. Cook County*, 28 Ill. 534; *People v. Hazelwood*, 116 Ill. 319; *McGurn v. Board of Education*, 133 Ill. 123. The penalties for the counterfeiting, and for the use of imitations and counterfeits, while intended as punishment for the violation of public law, are imposed to protect, in the language of the title, associations and others entitled to use labels, trademarks, and forms of advertisement in the use thereof. The objection is not well taken.

It is next said by counsel that "the statute is wholly void, because it is obnoxious to the constitutional inhibition (art. 4, sec. 22), which provides that the general assembly shall not

pass local or special laws granting any incorporation, association, or individual any special privilege, immunity, or franchise whatever." It is urged that, while "persons" are protected in their labels, etc., without regard to their avocations, "associations <sup>498</sup> or unions, to avail of the act, must be associations or unions of workingmen." This contention arises from a misapprehension of the statute. It seems clear that the legislature intended that any person, or any association of whomsoever formed, or any union of workingmen, might adopt such label, etc. If it be permissible to refer to the title of this act, this at once becomes apparent. By reference to section 1, before quoted, it will be seen it is there provided that "whenever any person, association, or union of workingmen have adopted a label," etc. The language of section 2 is, "person, union, or association," while sections 3 and 4 are the same as section 1. Now, referring to the title, it is seen that it is "An act to protect associations, unions of workingmen, and persons in their labels," etc.

Formerly, when the titles of acts were no necessary part of legislation, the title was not to be considered in construing the statute: *Plummer v. People*, 74 Ill. 361; *Wills v. Wilkins*, 6 Mod. 62; Endlich on Interpretation of Statutes, sec. 58, and note. It is, however, otherwise where, by virtue of constitutional provision, the legislature must prepare and adopt the title, to the end that it shall express the general purposes of the act. It cannot be resorted to to extend or restrain any positive provision in the body of the law itself: *Hadden v. Collector etc.*, 5 Wall. 107; *Williams v. Williams*, 8 N. Y. 535; *Myer v. Western Car Co.*, 102 U. S. 1; *Eby's Appeal*, 70 Pa. St. 311; *Halderman's Appeal*, 104 Pa. St. 251. It is one of the cardinal principles of construction that the intention of the lawmakers is to be found and given effect, and where there is otherwise doubt or obscurity in the act, or its meaning is doubtful, resort may be had to the title of the act to enable the court to discover the intent, and remove what otherwise might be uncertain or ambiguous: *United States v. Palmer*, 3 Wheat. 631; cases *supra*. The term "unions," as thus applied, has come to have a definite and well-understood meaning, and it is to be presumed that the legislature, in using <sup>498</sup> the broader and more comprehensive term "associations," and at the same time making the law applicable to all persons, intended the use of the words in their ordinary sense and signification. There is, indeed, no more reason for saying that by

"associations" is meant associations of workmen, thereby limiting the usual and ordinary meaning of the term, than there is to say that the word "persons," as used in the act, should be construed as applying to workmen only. The word "person" would have the effect of extending the act to, and would include, artificial as well as natural persons: Rev. Stats., sec. 1, c. 131. The objection is not tenable: *Hawthorn v. People*, 109 Ill. 302; 50 Am. Rep. 610.

It is next objected that the label, an imitation and counterfeit of which is alleged to have been unlawfully used by plaintiff in error, could not have been rightfully adopted either as a label, trademark, or form of advertisement. It is said that it transgresses the rules of morality and public policy. We are referred to the rule in respect to trademarks, that "to be a lawful trademark the emblem must avoid transgressing the rules of morality and public policy": Brown on Trademarks, sec. 602. And also to the case of *McKey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625, decided by the supreme court of Pennsylvania, which was a proceeding in equity to restrain the use of imitations of the label adopted by the Cigar Makers' International Union of America. It is conceded there is no statute in that state protecting labels adopted by dealers, etc. The case is cited mainly for the purpose of showing the construction placed upon the blue label by that court, the case having been decided upon other grounds. With all due deference, we are unable to concur in the views of the learned judge who delivered the opinion of the court. By reference to the label heretofore set out it will be seen that it is a certificate, signed by the president of the Cigar Makers' International Union of America, certifying that the cigars contained in the box upon which it is placed were "made by a first-class workman, a <sup>494</sup> member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship," and it concludes: "Therefore, we recommend these cigars to all smokers throughout the world." The purpose, as derived from the label itself, is to send the cigars out to the public with the assurance that they are made by a first-class workman, who belongs to an order opposed to the inferior workmanship designated. It will be observed that the label attacks no other manufacturer of cigars. It says simply, in effect, these cigars are not the product of inferior, rat shop, coolie, prison, or filthy

tenement-house workmanship. Can it be said that one may not, without condemning or aspersing the product of other manufacturers, commend the article he has for sale? If he may do so himself, may he not procure the certificate of others as to the quality of the article he puts upon the market? If one is engaged in the manufacture of wine, is it an aspersion upon the product of other manufacturers that a winegrowers' association certifies that his wine is the pure juice of the grape, free from adulteration? Certainly not. This label does not say, or purport to say, that cigars made by nonunion men are of the inferior class mentioned, or that cigars made by nonunion men are not free from the impurity or taint to which they might be subjected by such workmanship. It does, in effect, say that cigars are upon the market which are the product of rat shops, filthy basements, of Chinese establishments, of prisons, and tenement-houses, and proposes to assure customers that cigars sold under this label are not the product of such establishments. This and nothing more. And can it be doubted that public policy would be best served if all manufacturers of cigars would truthfully make the like assurance to the public?

We need not extend this discussion. We are of opinion that the label adopted by the Cigar Makers' International <sup>495</sup> Union of America is neither immoral nor against public policy, and might lawfully be adopted by that body.

Other errors are assigned which have been carefully considered, but are not deemed of sufficient importance to merit discussion.

The judgment of the criminal court of Cook county will be affirmed.

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**STATUTES CONTAINING MORE THAN ONE SUBJECT.**—To constitute duplicity of subject an act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any legitimate connection or relation to each other: *Johnson v. Harrison*, 47 Minn. 575; 28 Am. St. Rep. 382, and note, with the cases collected. See, also, the extended notes to *Davis v. State*, 61 Am. Dec. 337, and *Tuttle v. Strout*, 82 Am. Dec. 110.

**STATUTES—SUBJECT EXPRESSED IN TITLE.**—A statute is not open to the objection that it contains subjects not “clearly” expressed in its title when such subjects are all “referable and cognate” to the subjects expressed in such title: *State v. Harrub*, 95 Ala. 176; 36 Am. St. Rep. 195, and note. The title to an act must clearly express the subject or subjects contained therein, otherwise it is void: *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512, and note. The title to an act and the act itself must correspond, not literally, but substantially: *Macon etc. R. R. Co. v. Gibson*, 85



Ga. 1; 21 Am. St. Rep. 135, and extended note. See the notes to *People v. McCann*, 69 Am. Dec. 648; *Neunendorff v. Duryea*, 25 Am. Rep. 239, and the notes to *Hronek v. People*, 23 Am St. Rep. 663, and *Fidelity Ins. etc. Co. v. Shenandoah Valley R. R. Co.*, 19 Am. St. Rep. 872.

**STATUTES—INTERPRETATION—REFERRING TO TITLE.**—The character of a statute is not determined by its title, but by its provisions, unless its language is ambiguous, in which event its title and the occasion of its enactment may be considered to assist a correct understanding of its terms: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642; *Blakeney v. Blakeney*, 6 Port. 109; 30 Am. Dec. 574; *Bynn v. Clark*, 3 McCord, 296; 15 Am. Dec. 633; *Hart v. Mayor*, 9 Wend. 571; 24 Am. Dec. 165; *Sutherland v. De Leon*, 1 Tex. 250; 46 Am. Dec. 100, and note.

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## FIELD v. BARLING.

[149 ILLINOIS, 556.]

**STREETS—EASEMENT OF LIGHT AND AIR.**—A private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use, and a dedication of a strip of land for a public street embraces not only the surface of the ground but the air and light above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil.

**HIGHWAYS—EASEMENT OF LIGHT AND AIR.**—When a strip of land is declared a public highway, the adjoining owner has the right to light and air from it. The column of light and air above the roadbed is as much a part of the highway as the roadbed itself; and when cities or towns have been built up along a public highway the right to light and air from it becomes vested. Even the legislature has no power to deprive abutting owners of it without compensation.

**MUNICIPAL CORPORATIONS—CONTROL OVER STREETS—POWER TO DEVOTE TO PRIVATE USE.**—A city has ample power to control, regulate, and improve its streets and alleys in such manner as the demands of the public require; but it has no power to devote its alleys or streets, or any part thereof, to a private use.

**MUNICIPAL CORPORATIONS—STREETS.—STATUTORY DEDICATION** of streets and alleys to a city by the owner of land vests the fee thereto in the city in trust for the public use, and for no other purpose.

**MUNICIPAL CORPORATIONS—STREETS—DEDICATION, EFFECT OF.**—When the owner of land lays out and establishes a town, and makes and exhibits a plan thereof, with various plats of spare ground for streets and alleys, and sells lots with clear reference to such plan, the purchasers of lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as part of the town, or to their owners, as citizens of the town. The right thus passing to the purchasers is not the mere right that they may use the streets or other public places according to their appropriate purposes, but a right vesting in them that all persons whatever, as occasion may require or invite, may so use them, and that they shall be forever open

to the use of the public, free from all claim or interference of the land-owner inconsistent with such use.

**STREETS—NUISANCES—INJUNCTION.**—**IRREPARABLE INJURY** as used in the law of injunction against obstructions in public streets does not necessarily mean that the injury complained of is beyond the possibility of compensation in damages, nor that it must be very great, and the fact that no actual damages can be proved, so that in an action at law a jury could award nominal damages only, is sufficient reason why a court of equity should interfere by injunction when the nuisance is continuous.

**MUNICIPAL CORPORATIONS—STREETS—DEDICATION—RIGHT OF LOT-OWNERS TO LIGHT AND AIR.**—When the original owner of an addition to a city makes a plat dividing the land into blocks and lots, streets and alleys, and sells and conveys the lots with reference to that plat, a right arises in favor of purchasers of lots fronting on a street to have it forever kept open, and free from obstruction from the surface of the soil to the sky, for the passage of light and air. No grant or covenant is required to create this right which may be regarded as an incorporeal hereditament appurtenant to the lots.

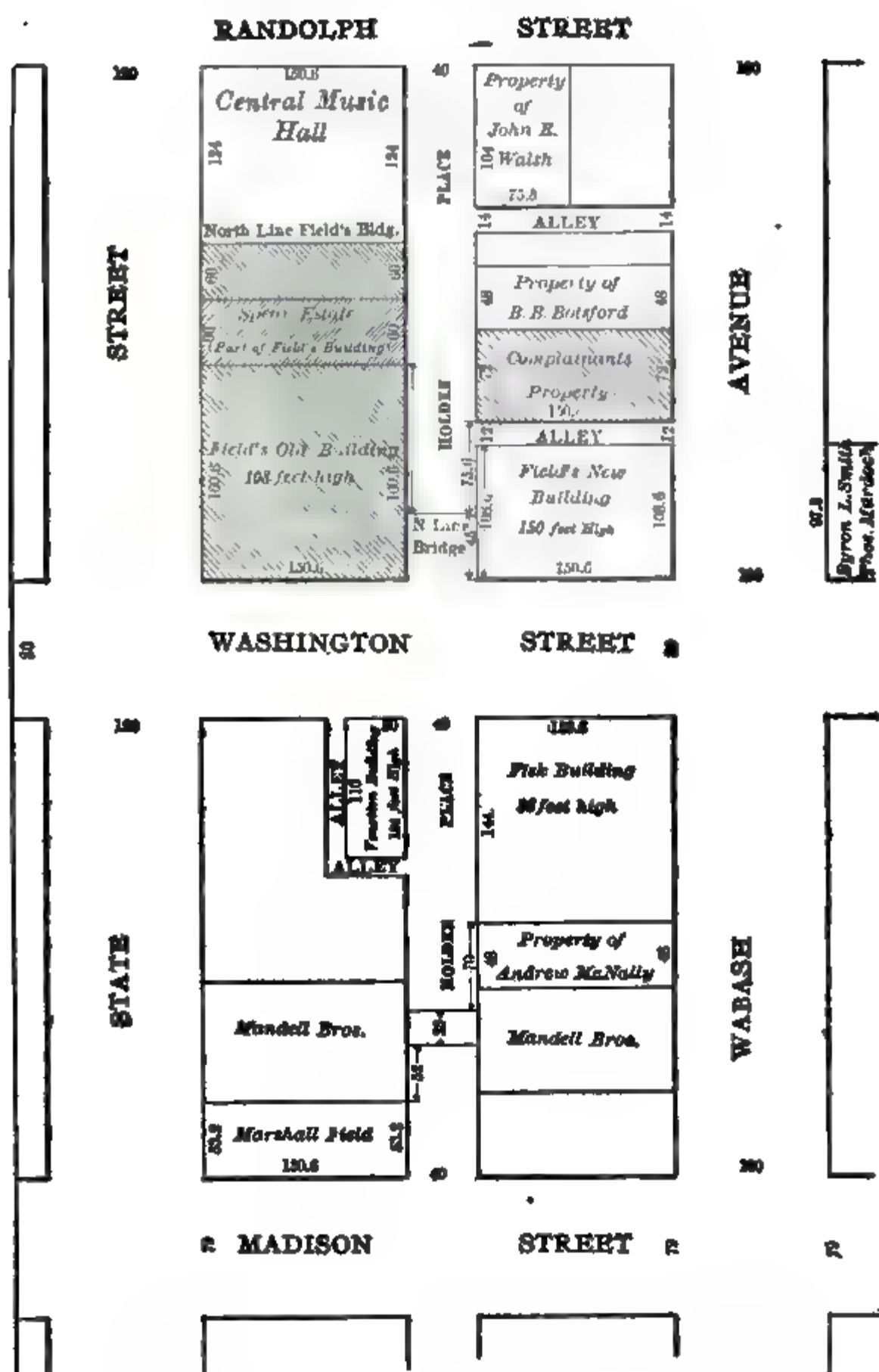
**MUNICIPAL CORPORATIONS—STREETS—RIGHT OF LOT-OWNER TO LIGHT AND AIR—INJUNCTION TO PRESERVE.**—An owner of a lot fronting a dedicated city street is entitled to an injunction to restrain the erection of a bridge across the street when its erection would obstruct the free passage of light and air, and result in serious damage to such lot-owner, different in character from that sustained by the public, and although the complaint and prayer for injunction describes a bridge of certain dimensions, the lot-owner is entitled to a decree enjoining the construction of any bridge across the street, and not to a decree confined to the particular kind of bridge described. It is the duty of the court to render a decree which settles the controversy.

*Wilson, Moore, and McIlvaine, for the appellants.*

*J. J. Herrick, for the appellees.*

561 **CRAIG, J.** This was a bill brought by Henry A. Barling, Edward H. Green, and Edward D. Mandell, trustees under the will of Edward Mott Robinson, deceased, against Marshall Field and others, to enjoin them from building or constructing any building, bridge, passageway, or other construction on, upon, or across the alley known as "Holden place" or "court," between the north line of Washington street and complainant's property described in the bill. The block in the city of Chicago bounded by Wabash avenue, Randolph, State, and Washington streets is known as block 13 of Fort Dearborn addition to Chicago. The land, when platted, belonged to the United States, and the plat of Fort Dearborn addition was executed and recorded in June, 1839. The following plat shows State street, Washington street, Wabash avenue, and Randolph street as originally laid out, and also Holden place. The plat also shows the location of complainants' property, and

the location of Field's old building and the new one, and the point where it was proposed to erect the bridge across Holden place, connecting the two buildings:



Holden place, as will appear from the plat, is forty feet wide, extending north and south through blocks 13 and 14.

<sup>563</sup> with lots on each side, those on the east fronting on Wabash avenue, and those on the west fronting on State street. Holden place has been used as a public place or street for many years. The defendants' lots on the northeast corner of Washington and State streets have a frontage of one hundred and sixty feet on State, extending back to Holden place, covered by a six-story building, occupied by Marshall Field & Co. for several years as a dry-goods house. The defendants have acquired lots on the northwest corner of Wabash avenue and Washington street, with a frontage of one hundred and eight feet on Wabash avenue, extending back to Holden place. On the latter lots the appellants commenced the erection of a new building nine stories high. At the time of the filing of the bill the new building had been erected six stories high, and the appellants were about to commence the erection of a bridge or passageway over Holden place, connecting the old and new buildings. The bridge or passageway, as disclosed by the answer, was to be eighteen feet above the surface of Holden place, three stories in height, extending north from Washington street over the alley, the entire width of the alley, the distance of forty-five feet, and upwards fifty-five feet, or seventy-three feet above the ground.

It is charged in the bill "that the effect of said construction of such connecting building, if the same be not prevented by this honorable court, will be to deprive your orator's said building and the occupants thereof, to a great extent, of sunshine, light, air, and warmth, which they have hitherto enjoyed by reason of the opening and keeping open of said court or alley from the time of said platting and subdivision down to the present; will give said alley an appearance of a private gateway and passage; will hinder and deter traffic, and in many other ways cause serious and continuing damage to your orators and their property; that such damage will amount to many thousands of dollars, and will be beyond legal remedy or relief if not prevented by this court." It is <sup>564</sup> also alleged that orators, and Marshall Field & Co., and the other defendants, hold their respective lands in said block 13 under a common source of title, viz., the United States, by patents made by the United States in pursuance of a subdivision, plat, and sales by the United States; that by reason of the exhibition and publication of the said subdivision and plat, and by the sale of lots thereunder to the respective grantors of your orators, and the said defendants, Marshall

Field & Co., or said Marshall Field, for their use, there has resulted, as between your orators and the said Marshall Field & Co., or such of them as own the said properties so fronting south on Washington street, on either side of said alley, a right, in law, to have the said alley remain absolutely and wholly open forever, of the same dimensions and to the same extent as delineated by the United States upon the subdivision and plat aforesaid, viz., from the north line of Washington street, forty feet in width, to the south line of Randolph street, and upwards to the sky.

In the answer appellants admit the intention to build the proposed bridge or structure over and across Holden place, but deny that it will interfere with the light, air, and ventilation of complainants' premises, or that it will in any manner injure complainants. The appellants also set up and rely upon an ordinance set out in complainants' bill, passed by the city of Chicago, June 6, 1892. Section 1 of the ordinance is as follows:

*"Be it ordained by the City Council of the City of Chicago:*

"SECTION 1. That permission and authority be and is hereby given to John M. Pashley, and his assigns, to construct and use a bridge or covered passageway across the alley running between lots 9, 10, and 11 on one side, and lot 6, in assessor's subdivision of lots 6, 7, and 8, etc., on the other, all in block 13, Fort Dearborn addition to Chicago, provided the lowest portion of said bridge or passageway shall not be lower than eighteen feet above grade of alley, and shall be so constructed ~~and~~ that free and unobstructed passage may be had under the same, and provided that said bridge or passageway shall be constructed of incombustible material, and to the satisfaction of the commissioner of buildings."

Section 2 provides that Pashley or his assigns, and all persons who shall occupy the buildings which the bridge is to connect, shall indemnify and save the city of Chicago harmless from all damages for which it may become liable by reason of the passageway granted.

It will not be necessary to cite authorities in support of the proposition that a private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use. Before Holden place was dedicated to the public as a street the title of the United States, the original proprietor, was not confined to the surface of the ground, but its title extended upward, embracing the light

and air as well as the soil, and the dedication of the strip of land for a public street embraced not only the surface of the ground but the light and air above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil.

In *Barnett v. Johnson*, 15 N. J. Eq. 481, where it was proposed to obstruct light and air over ground dedicated to the public, it is said: "When the strip of land is declared a public highway, the adjoining owner has the right to light and air from it. The column of light and air above the roadbed, whether of land or water, is as much a part of the highway as the roadbed itself. Take them away and there would be left no public passage. By its being declared a highway by the sovereign power the light and air above it become again the common property of all, which all may breathe and use whenever they may legally touch it, whether in the road or along its sides. . . . When cities and villages have been built up along a public highway the right to light and air from it becomes vested, and even the legislature would have no more <sup>566</sup> right to deprive them (abutting owners) of it without compensation than they would have to draw off the water from a navigable stream."

But the city of Chicago passed an ordinance which purported to authorize the construction of a bridge or passageway, and it becomes important to inquire in what manner the ordinance affected the rights of the parties in interest. The ordinance does not purport to grant the right for any public purpose. The use to be made of the street is a private one, solely for appellants' benefit in the transaction of their private business. Clause 7 of section 62, chapter 24, of the Revised Statutes, confers power on cities organized under the general incorporation act, as is the city of Chicago, to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same. But there is nothing in this section of the statute, or in any other portion of the general incorporation act, which confers the power on the municipality to devote a street, or any part thereof, to a mere private use. By the making of the plat in conformity to law there was a statutory dedication. The fee of the street passed to the city of Chicago, but the city held the fee in trust for the public, and for no other purpose. While the city had ample power to control, regulate, and improve the street in such man-

ner as the demands of the public required, the law conferred no authority on the city to devote the alley to private uses.

In the late case of *Smith v. McDowell*, 148 Ill. 51, where a city passed an ordinance to vacate a portion of a street for the purpose of allowing a private individual to use that portion for a part of a building about to be erected, it was held that the city had no power to devote the streets to that purpose. It is there said: "The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public <sup>567</sup> in all its parts, for free and unobstructed passage thereon by all persons desiring to use it.

"In *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479, we said, in treating the subject there under consideration: 'Whatever title to these public grounds may be vested in the city she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them. At most, she but holds them in trust for the benefit of the general public.' In *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243, after quoting with approval the foregoing language, it is said: 'It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use as streets, . . . as the public necessity may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the streets which might in any way interfere with the duty of preparing them for public use.' And in *Chicago etc. Canal Co. v. Garrity*, 115 Ill. 155, in considering the power of the municipality to grant rights in the public streets of the city, it was said: 'It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize as unquestionable law that the use of the streets . . . must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them, for private purposes.' In *Glasgow v. St. Louis*, 87 Mo. 678, under power 'to establish, open, vacate, alter, widen, extend, pave, or otherwise improve,



all streets,' etc., it was held that an ordinance to vacate a portion of one of the streets of the city for the use of private parties was *ultra vires*. See, also, *Reimer's Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108; 32 Am. Rep. 286; *State v. <sup>568</sup> Berdetta*, 73 Ind. 185; 38 Am. Rep. 117; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 127; *Dubach v. Hannibal etc. R. R. Co.*, 89 Mo. 486. And we held that the city cannot acquire land by condemning the same for a street when the real purpose is to devote it to a private use: *Ligare v. City of Chicago*, 139 Ill. 46; 32 Am. St. Rep. 179. In *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 127, the court held that the corporation could not condemn property for a public use, to be appropriated to a private use."

But it is claimed that appellees are not entitled to a decree unless they allege and prove they would sustain a special and substantial injury. It is conceded that both parties in this case derive title to their lots from a common source—the original proprietor of Kinzie's addition; that the conveyances were made with reference to the plat; that the streets and the alley in question, Holden place, all appear in the plat. It is claimed on behalf of appellees that where the owner of lots exhibits a plat of a town or addition, in which a street has been laid out and dedicated, and sells and conveys lots abutting on such street with a clear reference to the plat, the purchasers of such lots acquire, as appurtenant to their lots, the right to have the street kept open and maintained as a street.

In *Zearing v. Raber*, 74 Ill. 409, where a similar question arose, the court quotes from, and indorses what is said in Smith's Leading Cases, as follows: "If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as part of the town, or to their owners, as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchasers may use these streets or other public places according to their appropriate purposes, but a right vesting <sup>569</sup> in the purchasers that all persons whatever, as their occasion may require or invite, may so use them; in other words, the sale and conveyance of lots in the town, and according to its plan,

imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plat, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use." In *Earll v. City of Chicago*, 136 Ill. 285, the above case is quoted with approval and the same doctrine is announced.

In *Lake View v. Le Bahn*, 120 Ill. 92, where a lot-owner filed a bill to enjoin the town from prosecuting him for an alleged obstruction of a strip of land in what was claimed to be a platted street, on the ground that the dedication was invalid, the court directed the dismissal of the bill, and among other things said: "Each block was thus (by the plat and conveyances with reference to it) burdened with the easement of a street upon a strip of land thirty-three feet wide around it, and entitled to the benefit of the easement of a street of like width upon the adjoining side of the opposite block, so far as there was a block opposite, thus making a street sixty-six feet wide around each block. . . . In taking the several blocks of land with the arrangement of this system of streets there were implied mutual agreements that the streets should ever remain as platted—a dedication to the public use of the ground laid out as a street as effectual as could have been made by deed solemnly executed. . . . He (the adjoining lot-owner claiming to the center of the street) took and held an estate upon the condition of its being burdened with the easement of the streets, and the public authorities, in opening and improving the streets, act as for the representatives of the lot-owners, with others, in so doing."

*Newell v. Sass*, 142 Ill. 104, is also a case in point. There a bill was filed by a lot-owner to enjoin the owner of another lot in the same subdivision from obstructing an alley. The <sup>570</sup> defendant set up, among other things, that complainant was not injured, that she had no right to an injunction, and that there was a remedy at law. In the decision of the case it was, among other things, said: "Appellants invoked, as against this decree, the rule that equity will only interpose to prevent a threatened nuisance where the injury will be irreparable, where the complainant's right is clear, and where proof of the facts upon which the complainant rests is of the most convincing character. There is here no question as to the character of the act threatened, and complainant's right does not seem to be seriously contested. . . . The execution of the plat under which complainant claims her easement,

and the sale of the lots afterwards, in conformity therewith, are clearly proven. Appellants seem, at the time of filing the answer, to have been under the impression that appellee could derive no rights under the plat unless it had been accepted by the city or the public, and hence denied that there had ever been such acceptance. But appellee's right is established by showing that she owns an easement—the right of passage—incident to her ownership of her lot. . . . It is not necessary, in such case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial therefor: *Cihak v. Klekr*, 117 Ill. 643. 'Irreparable injury,' as used in the law of injunction, does not necessarily mean 'that the injury is beyond the possibility of compensation in damages, nor that it must be very great; and the fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one': Elliott on Roads and Streets, 497. . . . And this court has, in harmony with these authorities, held that injunction will lie to prevent obstruction to a private way, <sup>571</sup> on the ground that the party has no adequate remedy at law: *McCann v. Day*, 57 Ill. 101."

The same rule has been adopted in other states. In *Dill v. Board of Education*, 47 N. J. Eq. 421, an injunction at the suit of a lot-owner was sustained, restraining an obstruction of the light and air from an alley dedicated by plat. In the decision of the case it is said: "The right to have the alley thus described forever preserved as a street is a private right annexed as an appurtenant to the ownership of the land conveyed, and is entirely distinct from, and in addition to, the rights of the owner, as a citizen at large, to use the street after it should become a public street by acceptance by the public authorities. But while it is a private right it is, in my judgment, coextensive with the public right just mentioned, in that it goes the length of requiring that the alley should be preserved, in all respects, as if it were actually a public street": See, also, *Story v. New York Elevated Ry. Co.*, 90 N. Y. 123; 48 Am. Rep. 146; *Salisbury v. Andrews*, 128 Mass. 336; *Schwoerer v. Boylston Market Assn.*, 99 Mass. 285.

We do not understand that appellees' right to have Holden place kept free and clear of all obstruction rests on any per-

sonal covenant of the appellants, although that expression may be found in some of the cases. But when the original proprietor of the subdivision made the plat, dividing the land into blocks and lots, streets and alleys, and sold and conveyed the lots with reference to that plat, a right arose in favor of the purchasers of lots fronting on Holden place of having the street forever kept open—not that it should be kept free from obstruction on the surface of the soil alone, but to the sky. No grant or covenant was required to create this right. The dedication of the street by the plat, the sale of lots with reference to it, conveyance of abutting lots, and the payment of the money for the conveyances, were elements sufficient to create the right. The right may be regarded in the nature of an incorporeal hereditament. It becomes appurtenant to the lots. <sup>572</sup> As to the rights secured, they are plain: to have the street kept open, so that free access may be had to and from the lots abutting on the street, and that light and air may pass unobstructed across the open space between the surface of the street and the sky. Whether this right extends to all the streets in a subdivision, or is confined to streets which afford direct access to or egress from a particular lot, is a question which does not arise in this case. Here appellees' lots front on Holden place, and the obstruction is placed on the street between appellees' lots and Washington street, at a point affording the only means of access to and from Washington street, from which also light and air are derived.

We have been referred, in the argument, to *McDonald v. English*, 85 Ill. 232, and many other cases of that character, holding, as to obstructions in streets not resulting in special injury to the individual, the public only can complain. Under the facts as they appear in *McDonald v. English*, 85 Ill. 232, we find no fault with the law as laid down in that case, and the same may be said of other similar cases cited by counsel. But in those cases the question presented by the record in this case did not arise. No question arose in regard to the effect of a plat and conveyances in reference to that plat, and the rights and obligations of lot-owners who had purchased with reference to streets and alleys appearing on the plat, and no such question was considered or decided.

One other question remains to be considered, and that is whether the erection of the proposed structure will result in special damage to appellees' property different in character from that sustained by the public at large. The proposed

bridge or structure, as has been seen, was to be built from a point eighteen feet above the surface of the alley, fifty-five feet high and forty-five feet wide, extending from the north line of Washington street to within seventy-five feet of the south line of appellees' building. The character of the structure, as disclosed in the answer, is as follows: "It will be built of steel, <sup>573</sup> supported by steel and cast-iron columns of the old and new buildings. The columns in both buildings, the steel girders, and the steel beams in all floors, will be fire-proofed with hard-burned fire-clay. The north and south walls will be of terra cotta, and the roof covered with three-inch book-tile of fire-clay. The roof will be framed heavily, like a floor, and the fire-clay supported on 'T' irons, on eighteen-inch centers. The windows on the north side will be protected with rolling steel shutters. Each wall on each story will be practically a continuous window, so as to intercept light as little as possible."

In view of the size and character of the structure erected over the entire street, a main entrance to appellees' property for the transaction of business, and so near the property, it would seem that much additional evidence could not be required to establish that appellees would sustain special damages. But evidence was introduced tending to prove that the obstruction would seriously interfere with the light and the circulation of air at appellees' building. R. W. Hyman, a real estate agent in Chicago, of many years' experience, who was well acquainted with this property, testified that the erection of the structure would materially diminish the amount of air and light passing into said alley, and of the light and air derived by complainants' said building from said alley, and would darken and impede the approach to said building from Washington street by way of said alley, and in different ways would prevent the public from entering said alley as a means of access to said building from Washington street; that the erection and maintenance of such a structure will, in affiant's opinion, materially damage said complainant's property, and materially diminish its rental and other value, and that the damage to said property and its value will be continuous, and of such a character that it is not practicable to estimate the amount of the same with accuracy. Other evidence of a similar character was introduced, and on the other hand there was evidence that appellees' property would not <sup>574</sup> be damaged, but would be benefited. But from an ex-

amination of all the evidence we are satisfied that the erection of the structure would result in serious damage to appellees' property, different in character from that sustained by the public.

In the bill of complaint it was alleged that appellants intended to construct a certain bridge or passageway connecting the old and new buildings, which was described according to the information then in the possession of the appellees. The answer of appellants admitted the intention to build the proposed bridge or passageway for the purpose alleged, and described in detail the particular structure proposed to be built, giving the location, the height, width, and other dimensions of the proposed structure, but denied appellees' right to an injunction. The court, on the hearing, rendered a decree enjoining appellants from constructing any bridge across Holden place, and it is claimed the decree should have been confined to the particular kind of a bridge described in the answer. The object of the bill was to prevent the threatened injury, and a decree confined to a bridge or passageway of some particular description or dimensions might have opened the door to litigate this whole controversy over again, by an attempt on the part of appellants to construct a bridge a foot narrower or two feet lower, or varying slightly in some other respect from the bridge first contemplated. If, under the facts presented by the record, appellees were entitled to an injunction to prevent the threatened obstruction, as we think they were, it was the duty of the court to render a decree which would settle the controversy, and we think the decree rendered was the proper one, and it will be affirmed.

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**MUNICIPAL CORPORATIONS—CONTROL OVER STREETS—POWER TO DEVOTE TO PRIVATE USE.**—A municipal corporation cannot, without clear legislative authority, grant the exclusive right to the use of streets for certain purposes to an individual or corporation: *Cincinnati etc. Ry. Co. v. Telegraph Assn.*, 48 Ohio St. 390; 29 Am. St. Rep. 559. A municipal corporation has no power to authorize private persons or corporations to erect or maintain permanent obstructions in the public streets for purely private purposes: *Savage v. Salem*, 23 Or. 381; 37 Am. St. Rep. 688, and note.

The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage. For those purposes a city may improve and control them, and adopt all needful rules and regulations for their management and use, but cannot alienate or otherwise dispose of them: *Chicago etc. R. R. Co. v. Quincy*, 136 Ill. 563; 29 Am. St. Rep. 334, and note.

**LIGHT AND AIR, EASEMENT OF IN STREETS.**—It is undoubtedly well settled, as stated in the principal case, that when a strip of land has become a public street, either by dedication or by legislative action, the owner of a lot



abutting thereon has the right to the light and air from the street. This right may be regarded as in the nature of an implied easement appurtenant to the lot, giving to the owner the right to have the street kept open so that free access may be had to and from the lot abutting on the street, and that the light and air may pass unobstructed across the open space between the surface of the street and the sky.

The right of the adjoining lot-owner to the free and unobstructed passage of the light and air from a public street or alley to his property exists without regard to the ownership of the fee in the street: *Barnett v. Johnson*, 15 N. J. Eq. 481; *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268; *Dill v. Board of Education of Camden*, 47 N. J. Eq. 421; *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286; 12 Am. St. Rep. 644; *Fifth Nat. Bank v. New York Elevated R. R. Co.*, 24 Fed. Rep. 114.

The above cases also maintain the proposition that if a party seeks to erect such an obstruction in the street as interferes with the free passage of the light and air therefrom, the adjacent lot-owner is entitled to an injunction to restrain such erection, or if the obstruction is already erected, such lot-owner may maintain an action to recover damages for the injury suffered from the loss of the light and air to which he is entitled under his easement. The first case in which this question arose and was decided was *Barnett v. Johnson*, 15 N. J. Eq. 482. In that case the Morris canal by its nature, by long use, by dedication, and by express statutory enactment, had become a public highway. Upon its banks the city of Newark had been built. The complainant owned a house and lot in such city, fronting on the canal. The defendant, under license from the canal company, proposed erecting a building several stories high, touching the house and shutting up the windows of the complainant, who prayed for an injunction to restrain the erection of such building. It was insisted, on the part of the canal company and its licensee, that as they owned the *locus in quo* in fee they had a right to do with it as they pleased. Mr. Justice Vredenburg, speaking for the court of errors and appeals, in passing upon the questions involved, said: "There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air. In the first place, has not the adjacent owner upon the ordinary public highway, of common right, the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns, and cities in this country and in all others, now, and at all times past, been built up upon this assumed right of adjacency? Is not every window and every door in every house in every city, town, or village, the assertion and maintenance of this right? When people build upon the public highway, do they inquire or care who owns the fee of the roadbed? Do they act or rely upon any other consideration except that it is public highway, and they the adjacent owners? Is not this a right of universal usage and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they



would soon become tenantless? It is a right essential to the very existence of dense communities. What must be the consequence to permit the accidental owner of a part or the whole of the roadbed to wall up or throw a thin curtain in front of the adjacent buildings, or by any other contrivance shut out from them the light and air? . . . In the charters of our canals, rail, and plank roads they are generally declared to be public highways. Are we to declare, with respect to all these, that they are highways only for the purpose of public passage, and that the accidental owner of the fee of the roadbed, whether such owner be the company or a private individual, can in all these cases, for no purpose connected with the public right of passage, shut up all the doors and windows of the adjacent houses *ex vi termini*? When a strip of land is declared a public highway the adjoining owner has a right to the light and air from it. The column of light and air above the roadbed, whether of land or water, is as much a part of the highway as the roadbed itself. Take them away and there would be left no public passage. By its being declared a public highway by the sovereign power, the light and air above it becomes again the common property of all, which all may breathe and use whenever they may legally touch it, whether in the road or along its sides. What good reason exists why this kind of highway should differ in this respect from the ordinary ones? This right to receive light and air is subordinate to every purpose connected with the full enjoyment of public passage. The same necessity exists for it here as in that of the ordinary highway. . . . In case the canal, turnpike, or railroad ceases to be such, the public highway still continues. The streets, villages, and towns that have been built up along their lines cannot be sealed up in darkness by whoever may be the accidental owner of the roadbed until it is legally vacated. When streets and villages have been built up along a public highway the right to light and air from it becomes vested, and even the legislature would have no more right to deprive them of it without compensation than they would to draw off the water from a navigable stream. I am of opinion that the Morris canal is a public highway, declared so by the legislature, among other things, to create and protect these rights of adjacent owners, and that the complainant as such, has, of common right, the privilege of receiving from it light and air, and consequently is entitled to his injunction." This same doctrine is maintained in what are known as the "elevated railway cases"—*Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; and *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268—of which it was said in *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 294, 12 Am. St. Rep. 644, that they "are notable in several respects: 1. Because they are the first cases in which was fairly presented so as to demand a direct decision, the claim of abutting lots to an easement in the street in their front for the purposes of light and air; 2. For the number and ability of the counsel on each side, and the thoroughness with which they discussed every point involved, and presented every argument *pro* and *con* that could be suggested; and lastly, and especially, for the exhaustive character of both the prevailing and dissenting opinions by the members of the court. The latter case was really a reargument of the questions presented in the former, and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it, and give to the principles determined a wider application than appears to have been given to them in the first case. We think that in those cases the doctrine is unqualifiedly established that, no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that

the only right of the public is to hold it for public use as a street forever, and, no matter who may own the fee, an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right to free access to his premises, and the free admission and circulation of light and air to and through his property."

"The conclusions arrived at are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right. That, depriving him of or interfering with his enjoyment of the easement for any public use, not proper street use, is a taking of his property within the meaning of the constitution. That appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. That where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street. That the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street":

*Adams v. Chicago etc. R. R. Co.*, 39 Minn. 296; 12 Am: St. Rep. 614. The same conclusion was reached in *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122-145, 34 Am. Rep. 146, where Danforth, J., in delivering the opinion of the court, said, in speaking with reference to the rights of an abutting lot-owner:

"But what is the extent of this easement? What rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface, and to its user the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its grant, and violate the arrangement on the faith of which the lot was purchased. This, in effect, was an agreement that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. . . . The elements of light and air are both to be derived from the space over the land on the surface of which the street is constructed, and which is made servient for that purpose; he therefore has an interest in that land, and when it is sought to close it, or any part of it, above the surface of the street, so that light is in any measure to his injury prevented, that interest is to be taken, and one whose lot, acquired as this was, is directly dependent upon it for a supply, becomes a party interested and entitled, not only to be heard, but to compensation. The easement is property within the meaning of the constitution and the statutes authorizing the construction of the defendants' elevated railroad, and the owner is, in the language of the act, a person having an 'estate or interest in real estate so that, if proceedings were instituted to condemn the street for railroad uses, he would, as one of those persons whose estate or interests are to be affected by the proceedings, be entitled to notice of the same and compensation.'"

In the subsequent case of *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 269, it was again decided "that abutters upon a public street claim-

ing title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property shall forever thereafter continue for the free and common passage, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage of light and air through and over such street for the benefit of the property situated thereon. That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term, as used in the constitution of the state, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam-engines, generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking. The court, through Chief Justice Ruger, further said: "An abutting owner necessarily derives certain advantages from the existence of an open street adjoining his property, which belongs to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising the fund necessary to defray the cost of constructing the street. He is therefore compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property. . . . It follows necessarily from this proposition that a permanent structure, erected in a street, interrupting to any considerable extent the passage of light and air to adjacent premises, works the destruction of easements for such purposes; that any incident of the structure which necessarily increases and aggravates the injury must be subject to the same rule of damage": *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 295. This doctrine meets with approval in *Fifth Nat. Bank v. New York Elevated R. R. Co.*, 24 Fed. Rep. 114; but it is there determined that a finding that a new and inconsistent use has been imposed upon the street by the construction of an elevated railroad is not justified unless travel is practically impeded, or light in the traveled way is sensibly diminished. The same rule was adopted in *Dill v. Board of Education of Camden*, 47 N. J. Eq. 421, where it was decided that when an owner makes a map of his land showing streets upon it, and sells lots abutting upon and calling for such a street, but it is never accepted or used by the public, the purchasers, notwithstanding this, acquire the same rights in the street, so-called, as against the original owner and each other, as they would if it were in fact a public street, and are entitled to an injunction restraining an obstruction of the light and air from the street so dedicated. The court said: "The right to have the alley, thus described, forever preserved as a street is a private right annexed as

an appurtenant to the ownership of the land conveyed, and is entirely distinct from and in addition to the right of the owner as a citizen at large to use the street after it should become a public street by acceptance by the public authorities. But while it is a private right, it is, in my judgment, coextensive with the public right just mentioned, in that it goes the length of requiring that the alley should be preserved in all respects as if it were actually a public street. As between the parties against whom the estoppel acts, it has all the attributes of a public street, though never in fact accepted by the public. If we inquire what those rights are, we find that they are twofold: 1. A right of access from the abutting property, and a passage to and fro over it in all its extent; and 2. A right of air, light, prospect, and ventilation. These rights are quite distinct from each other, and capable of being separately exercised and enjoyed. The right of light and air and ventilation may be enjoyed fully without the least exercise of the right of access and passage." In *American Bank Note Co. v. New York Elevated R. R. Co.*, 129 N. Y. 254, it was decided that although the elevated railroads in New York city stand wholly upon lands owned by the municipality, yet the railway corporations are liable to abutting owners for such consequential damages as result from an invasion of property rights, such as the taking of their easements of light and air, but these easements may be acquired by the railroad companies by adverse possession thereof under claim of right and color of title, although possession is not based on any actual adverse title. If an alley is a public one an adjoining owner has an easement therein for light and ventilation.

If an alley or other way is not public, but private, and the fee remains in the original owner, the fact that it has remained a long time unclosed, and that an adjoining owner has built his house with windows and doors opening upon it, and has enjoyed the benefit of light and ventilation from it, confers no right upon him to have it kept open: *Dexter v. Tree*, 117 Ill. 532. In such case the owner of the fee in the soil of the alley, over which he has only granted a right of way, may erect a building or other structure over the alley, if, in so doing, he does not interfere with the right of way: *Sutton v. Groll*, 42 N. J. Eq. 213; *Gerrish v. Shattuck*, 132 Mass. 235; *Atkins v. Bordman*, 2 Met. 457; 37 Am. Dec. 100.

An owner of a lot separated from a park or square by a street has no easement of light or air from the square in the absence of an express grant: *Greene v. New York etc. R. R. Co.*, 65 How. Pr. 154.

As between private owners of lots in cities with a passageway between their properties an easement of light and air from the passageway created by express grant in the conveyance of the lots, may be preserved by injunction at the instance of the grantee or his successor: *Schworer v. Boylston Market Assn.*, 99 Mass. 285; *Brooks v. Reynolds*, 106 Mass. 31; *Hagerty v. Lee*, 54 N. J. L. 580; *Rector etc. of Episcopal Church v. Mack*, 93 N. Y. 488; 45 Am. Rep. 260. But, as between private lot-owners, the one purchasing from the other has no implied easement of light and air from the property of the grantor remaining unoccupied, unless it is absolutely necessary to the enjoyment of the property conveyed, and in contemplation of the parties at the time the grant was made: *Powell v. Sims*, 5 W. Va. 1; 13 Am. Rep. 629; *Randall v. Sanderson*, 111 Mass. 115; *Keats v. Hugo*, 115 Mass. 204; 15 Am. Rep. 80; *Keiper v. Klein*, 51 Ind. 316; *Rennyson's Appeal*, 94 Pa. St. 147 39 Am. Rep. 777; *Case v. Minot*, 158 Mass. 577.

No attempt is here made to treat of prescriptive easements in light and air. The general rule prevailing in this country is that such easement can

not be gained by prescription: See the cases last above cited, and *Parker v. Foote*, 19 Wend. 309; *Doyle v. Lord*, 64 N. Y. 432; 21 Am. Rep. 629; *White v. Bradley*, 66 Me. 254; *Turner v. Thompson*, 58 Ga. 268; 24 Am. Rep. 497; *Ward v. Neal*, 37 Ala. 500; *Stein v. Hauck*, 56 Ind. 65; 26 Am. Rep. 10; *Napier v. Bulwinkle*, 5 Rich. 311; *Cherry v. Stien*, 11 Md. 1; *Mullen v. Stricker*, 19 Ohio St. 135; 2 Am. Rep. 379; *Pierre v. Fernald*, 26 Me. 436; 46 Am. Dec. 573, and extended note, 578-583.

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## BURDICK v. PEOPLE.

[149 ILLINOIS, 600.]

### CONSTITUTIONAL LAW—STATUTE REGULATING SALE OF RAILROAD TICKETS.

A statute prohibiting the sale of railroad tickets or parts thereof, except by authorized agents, or by parties who have purchased tickets with a *bona fide* intention of traveling thereon, is not unconstitutional. It does not deprive an unauthorized holder of a ticket of his property without due process of law.

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. An act of the legislature is not necessarily the law of the land, nor can a state make every thing due process of law which by its own legislation it declares to be such.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A statute which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power. It attempts to deprive a man of his property without due process of law.

CONSTITUTIONAL LAW—REGULATION OF RAILROADS.—The franchises of railroads acting under charters or acts of incorporation are of a public nature so far as the safety, convenience, and comfort of passengers are concerned. Reasonable regulations, affecting the conduct of such public employments, are fit subjects for legislative action. The legislature may provide means for remedying such evils, as, in its opinion, may exist in the management of these public agencies of transportation. In doing so it may sometimes impose restrictions, which are deemed to be necessary upon the use and enjoyment of property.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW.—A man is not deprived of his property without due process of law unless it is taken away from him so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property, whose use and enjoyment is thus limited, is invested in a business affected with a public use, or is used as an accessory in carrying on such business.

RAILROADS—TICKETS AS CONTRACTS.—A railroad ticket is not a contract, but merely evidence of a contract or a mere receipt taken, or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another.

CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATIONS OF CONTRACTS.—A statute tending to impair the obligation of a contract is inoperative as

to contracts existing at the time of its passage, but valid and operative as to future contracts.

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE POWER.**—The deposit in Congress of the power to regulate commerce between the states is not intended to rob the latter of their police power. Under such power they may legislate to promote domestic morals, order, and safety, to secure general comfort, health, and prosperity, to prevent crime, pauperism, disturbance of the peace, and all forms of social evils, and to protect the lives, limbs, quiet, and property of all their citizens.

**CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE.**—A state cannot invade the domain of the national government, or assume powers properly belonging to Congress, and in relation to the subject of commerce including interstate passenger travel the state cannot place any obstacle in the way of such travel, or impose any burden upon it; but many acts of a state may affect or influence commerce without amounting to a regulation of it.

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE—POLICE POWER.**—State legislation which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional as infringing upon the power of Congress.

**RAILROADS—REGULATION OF BUSINESS OF—POLICE POWER.**—The business of a railroad carrier, and incidentally the manner of the sale of its tickets to points within the state, is a proper subject for the exercise of the police power of a state, and may be regulated by legislative action.

**CONSTITUTIONAL LAW—REGULATION OF SALE OF RAILROAD TICKETS—POLICE POWER.**—A statutory requirement that railroad tickets shall be sold only by authorized agents is merely a police regulation as to the manner in which the business of the carrier shall be conducted, and is not unconstitutional as a grant of a special privilege to a class of persons, nor as creating a monopoly of the ticket business, nor as abridging the privileges or immunities of citizens.

*Hill and Martin*, for the appellant.

*M. T. Moloney*, attorney general, *J. W. Herbert*, state's attorney, *W. S. Forrest*, and *M. Rosenthal*, for the people.

602 **MAGRUDER, J.** This was an indictment against plaintiff in error for wrongfully and unlawfully selling to one L. H. Myers one certain railroad ticket, entitling the holder thereof to travel upon the Illinois Central Railroad from Cairo, in Illinois, to Chicago, in the same state, in violation of the following statute of Illinois:

*"An Act to Prevent Frauds upon Travelers, and Owner or Owners of any Railroad, Steamboat, or other Conveyance for the Transportation of Passengers.—Approved April 19, 1875; in force July 1, 1875.*

**"SECTION 1.** Be it enacted by the people of the state of Illinois, represented in the general assembly: That it shall  
603 be the duty of the owner or owners of any railroad or



steamboat for the transportation of passengers, to provide each agent who may be authorized to sell tickets or other certificates entitling the holder to travel upon any railroad or steamboat, with a certificate setting forth the authority of such agent to make such sales, which certificate shall be duly attested by the corporate seal of the owner of such railroad or steamboat.

"SEC. 2. That it shall not be lawful for any person not possessed of such authority so evidenced to sell, barter, or transfer, for any consideration whatever, the whole or any part of any ticket or tickets, passes, or other evidences of the holder's title to travel on any railroad or steamboat, whether the same be situated, operated, or owned within or without the limits of this state.

"SEC. 3. That any person or persons violating the provisions of the second section of this act shall be deemed guilty of misdemeanor, and shall be liable to be punished by a fine not exceeding five hundred dollars, and by imprisonment not exceeding one year, or either or both, in the discretion of the court in which such person or persons shall be convicted.

"SEC. 4. That it shall be the duty of every agent who shall be authorized to sell tickets or parts of tickets, or other evidences of the holder's title to travel, to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request him, the certificate of his authority thus to sell, and to keep said certificate posted in a conspicuous place in his office for the information of travelers.

"SEC. 5. That it shall be the duty of the owner or owners of a railroad or steamboat, by their agents or managers, to provide for the redemption of the whole or any parts or coupons of any ticket or tickets as they may have sold, as the purchaser, for any reason, has not used and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between ~~the~~ the points for which the proportion of said ticket was actually used; and the sale by any person of the unused portion of any ticket, otherwise than by the representation of the same for redemption, as provided for in this section, shall be deemed to be a violation of the provisions of this act, and shall be punished as is hereinbefore provided: *Provided*, that this act shall not prohibit any person who has purchased a ticket from any agent authorized by this act, with the bona



*fide* intention of traveling upon the same, from selling any part of the same to any other person.

"SEC. 6. Any railroad or steamboat company that shall, by any of its ticket agents in this state, refuse to redeem any of its tickets or parts of tickets, as prescribed in section 5 of this act, shall pay a fine of five hundred dollars for each offense to the people of the state of Illinois, and it shall be unlawful for said company, subsequent to such refusal, to sell any ticket or tickets in this state until such fine is paid": 2 Starr and Curtis' Ann. Stats., 1951.

The defendant, before pleading to the indictment, moved to quash it upon the alleged ground that said act was in contravention of the constitutions of the United States and of the state of Illinois, but said motion was overruled and exception taken. The court refused to give for the defendant an instruction, to the effect that said act was in contravention of said constitutions, and therefore void, to which refusal defendant excepted. The jury found the defendant guilty; motions for new trial and in arrest of judgment were overruled, to which exception was taken; and judgment was entered upon the verdict fining defendant five hundred dollars, to which also exception was taken.

The subject presented for consideration is the constitutionality of the above act, and we will consider the objections to its validity in the order in which they are presented by the counsel for the plaintiff in error in their brief.

605 1. It is contended that the act violates section 2 of article 2 of the constitution of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law"; and that it also violates the provisions of a similar character in the federal constitution: U. S. Const., arts. 5, 14, of Amendments; 1 Starr and Curtis' Ann. Stats. 36, 38, 99. The position of counsel is that, when a man purchases tickets or other certificates entitling the holder to travel upon any railroad, etc., as stated in the act, such tickets are his property, and that the legislature has no authority to pass an act depriving the holder of such property of the right to sell it to whom he pleases. The constitution does not say that the disposition of property may not be limited or regulated where the interests of the public so require, but that no person shall be "deprived" of his property without due process of law. The phrase "due process of law" is equivalent of the words "law of the land," as

used in Magna Charta, and means, "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights": *Board of Education v. Bakewell*, 122 Ill. 339; *Rhinehart v. Schuyler*, 7 Ill. 473; *Davidson v. New Orleans*, 96 U. S. 97; Cooley on Constitutional Limitations, 5th ed., marg. p. 356, top p. 435. An act of the legislature is not necessarily the "law of the land." A state cannot make any thing "due process of law" which, by its own legislation, it declares to be such. An act of the legislature which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power, because, if effectual, it operates to deprive a man of his property without "due process of law": *Davidson v. New Orleans*, 96 U. S. 97; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 274; *Rohn v. Harris*, 130 Ill. 525; *Ervine's Appeal*, 16 Pa. St. 256; 55 Am. Dec. 499; *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677.

If, therefore, the above act of 1875 operates to deprive the holder of a legally purchased ticket of his property rights ~~and~~ therein it must be declared to be void. But, upon turning to section 5 of the act, we find that it authorizes the original purchaser of a ticket from an authorized agent to resell the whole, or any unused part, of such ticket, to the owner of the railroad or steamboat who sold it to him, or to sell any part of it to any other person, if the original purchase of it from the agent was with the *bona fide* intention of traveling upon it. The purchaser is entitled to have his ticket redeemed by the railroad or steamboat owner at a rate fixed by the terms of section 5, but his right of sale is not even limited to such owner provided only his purchase was made in the mode and for the purposes stated in the proviso to the section. In view of the provisions contained in sections 5 and 6 we fail to see how the owner of the ticket is deprived of his property in it. His ticket is not destroyed, nor is there any very serious limitation upon his use of it.

The design of the act, as stated in its title, is to prevent frauds upon travelers and owners of railroads, steamboats, and other conveyances for the transportation of passengers. The business of a common carrier is a public employment. The franchises of railroads, acting under charters or acts of incorporation, are of a public nature so far as the safety, convenience, and comfort of passengers are concerned. Reasonable regulations, affecting the conduct of such public

employments, are fit subjects for legislative action. The law-making power may provide means for remedying such evils as, in its opinion, may exist in the management of these public agencies of transportation, and in doing so it may sometimes impose restrictions which are deemed to be necessary upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him, so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner when the property, whose use and enjoyment are so limited, is invested in a business <sup>697</sup> affected with a public use, or is used as an accessory in carrying on such business: *Munn v. People*, 69 Ill. 80; *Commonwealth v. Wilson*, 14 Phila. 384. We are, therefore, of the opinion that the act under consideration does not violate section 2 of the bill of rights.

2. The act is alleged to contravene the provisions of the federal and state constitutions, which forbid the passage of laws impairing the obligation of contracts: U. S. Const., art. 1, sec. 10; Ill. Const., art. 2, sec. 14; 1 Starr and Curtis' Ann. Stats., 31, 105.

The tickets proven to have been sold by plaintiff in error contain only the name of the railroad company, the words "Cairo to Chicago," the signature of the general ticket agent, and certain figures or numbers. It has been held that such a ticket is not a contract, but merely the evidence of a contract, or a mere receipt taken or voucher adopted for convenience, to show that the passenger had paid his fare from one place to another: *Logan v. Hannibal etc. Ry. Co.*, 12 Am. & Eng. R. R. Cas., 141; 2 Redfield on Law of Railroads, 6th ed., 303; Ray's Negligence of Imposed Duties, 495; *Commonwealth v. Wilson*, 14 Phila. 384. But, if it be admitted that the ticket is a contract, the statute would only be inoperative and of no effect as to contracts existing at the time of its passage; it would be valid and constitutional as to future contracts. It cannot be said that the act of 1875 impaired the obligation of any contract connected with the tickets upon the sale of which the present indictment is predicated. The tickets sold by plaintiff in error were issued by the railroad company in 1893, eighteen years after the passage of the act. The plaintiff in error must be presumed to have known that the sales of the tickets by him were criminal acts: *Fry v. State*, 63 Ind. 552; 30 Am. Rep. 238; *Commonwealth v. Wilson*, 14 Phila. 384.

3. The act is charged with contravening the third clause of section 8 of article 1 of the federal constitution, which ~~con~~ confers upon Congress the power to regulate commerce among the several states: 1 Starr and Curtis' Ann. Stats. 30.

In the present case the tickets sold only entitled the holder to travel between points located wholly within the state of Illinois. But the portion of the act upon which the present objection is founded is the prohibition, contained in the second section, against the sale of tickets entitling the holder to travel on any railroad or steamboat, "whether the same be situated, operated, or owned within or without the limits of this state."

It is held by the supreme court of the United States that interstate commerce, the regulation of which is within the exclusive power of Congress, includes interstate transportation of passengers. But the deposit in Congress of the power to regulate commerce between the states was not intended to deprive the states of their police power. Under its police power a state may legislate to promote domestic order, morals, and safety; to protect the lives, limbs, quiet, and property of all persons within the state; to secure the general comfort, health, and prosperity of the state; to prevent crime, pauperism, disturbance of the peace, and all forms of social evils. The state cannot invade the domain of the national government, or assume powers properly belonging to Congress. In relation to the subject of commerce, including interstate passenger travel, the state cannot place any obstacle in the way of such travel or impose any burden upon it. But many acts of a state may affect or influence commerce without amounting to a regulation of it. State legislation, which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional as infringing upon the powers of Congress. The act of 1875 is, we think, such a species of state legislation. The duties which it imposes upon the carriers therein named and their agents cannot interfere with the freedom of interstate travel. ~~con~~ Such travel is not impeded, because tickets are required to be purchased from agents of the carrier who are provided with certificates of their authority. The limitation of the sale of tickets to such agents may be a restraint upon the business of scalpers and ticket brokers, but cannot be regarded as a burden upon interstate commerce. If the body of the act of 1875 be read in

connection with its title it must have been the opinion of the legislature that the restriction of sales of tickets to authorized agents was necessary to prevent frauds upon travelers and carriers, and to remedy the evils growing out of the practices of scalpers and ticket brokers, as described by Mr. Ray in his work on Negligence of Imposed Duties, Passenger Carriers, at pages from 491 to 498, inclusive. Viewed in this light the act in question amounts to nothing more than the regulation of a public employment under the police power of the state.

The business of the carrier being a proper subject for the exercise of the police power its necessary incidents and adjuncts are also subject thereto. As the issuing and use of tickets are required in such business, their sale is an incident thereof, and may be regulated by legislative action. It is the province of the legislature to determine the nature and character of such regulations, and the judiciary is not called upon to consider whether they are wise or unwise. The views herein expressed are sustained by the following authorities: *Fry v. State*, 63 Ind. 552; 30 Am. Rep. 238; *Commonwealth v. Wilson*, 14 Phila. 384; *People v. Walser*, 11 Legal News, 12; *Railroad Co. v. Husen*, 95 U. S. 465; *Patterson v. Kentucky*, 97 U. S. 501; Cooley on Constitutional Limitations, 5th ed., marg. pp. 574, 597.

We do not think that the act violates the constitutional provision conferring upon Congress the power to regulate interstate commerce.

4. It is claimed that the act violates that part of section 22 of article 4 of the constitution of Illinois, which provides that the general assembly shall not pass special laws <sup>610</sup> "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever": 1 Starr and Curtis' Ann. Stats., 119, 120.

Counsel contend that, by the terms of the act, a certain class of persons, namely, railroad ticket agents, are permitted to sell tickets, and are thereby granted a special privilege. We do not think that there is any force in this contention. It is disposed of by what has already been said in regard to the validity of the act as an exercise of the police power of the state. The requirement that tickets shall only be sold by agents authorized so to do is merely a police regulation as to the manner in which the business of the carrier shall be conducted. From the nature of things, only common carriers can, in the first instance, issue or sell tickets for passage in

their own conveyances or over their own lines. They have no more a monopoly of the ticket business than a manufacturer has of the articles which he manufactures. The authority to the agent is not an authority to sell tickets generally for all other carriers, but only to sell them for the particular carrier providing the certificate of authority. The act would seem to impose upon the carrier a burden and not to grant a privilege or immunity, as the repurchase of unused tickets is required, and, in order to prevent frauds, the sale of tickets can only be made through agents authorized to sell in the particular mode designated by the statute.

Substantially the same phraseology contained in section 1 of the present act, to which counsel object as amounting to special legislation, is to be found in an act passed by the legislature of Indiana, which was upheld by the supreme court of that state, as being consistent with a constitutional requirement forbidding the legislative grant of exclusive privileges or immunities to any citizen or class of citizens: *Fry v. State*, 63 Ind. 552; 30 Am. Rep. 238. We see no good reason for adopting a different conclusion.

¶ Nor can it be said that the law abridges "the privileges or immunities of citizens of the United States": U. S. Const., art. 14, sec. 1, of Amendments; 1 Starr and Curtis' Ann. Stats., 38. The privileges or immunities referred to in the fourteenth amendment of the federal constitution are those which are fundamental, such as "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." No privilege or immunity of the plaintiff in error has been abridged by the act of 1875. The right of conducting the business of selling railroad and steamboat tickets is curtailed and hedged about by certain restrictions, which the legislature deemed necessary to prevent frauds upon travelers and public carriers. But these restrictions amount only to "such restraints as the government may justly prescribe for the general good of the whole": *Corfield v. Coryell*, 4 Wash. C. C. 371; *Slaughter House cases*, 16 Wall. 36.

In the case at bar our conclusion is, that the statute of this state above quoted is not in conflict with the federal constitution or with the constitution of this state, but was a

legitimate exercise by the legislature of the police powers of the state. Accordingly, we hold that no error was committed by the court below in its rulings above indicated.

The judgment of the circuit court is affirmed.

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**RAILROADS.—LEGISLATIVE REGULATION OF:** See *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; *ante*, 278, and note, and the extended note to *People v. Budd*, 15 Am. St. Rep. 490.

**STATUTES—DUE PROCESS OF LAW DEFINED.**—"Due process of law" means at least some legal procedure in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself: *Doyle, Petitioner*, 16 R. L. 537; 27 Am. St. Rep. 759, and note. Due process of law is such an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs: *Wulzen v. Board of Supervisors*, 101 Cal. 15; 40 Am. St. Rep. 17, and note. See, also, the extended notes to *Embury v. Conner*, 53 Am. Dec. 337; *Bank v. Cooper*, 24 Am. Dec. 538; and *Burdwell v. Collins*, 20 Am. St. Rep. 554.

**STATUTES—DUE PROCESS OF LAW.—DEPRIVING OF PROPERTY WITHOUT:** See *Wadsworth v. Union Pac. Ry. Co.*, 18 Col. 600; 36 Am. St. Rep. 309, and note; and *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477, and note.

**RAILROADS—TICKETS.**—A railway ticket is a mere token that fare has been paid and that the passenger has the right to be carried to the destination it indicates according to the reasonable rules of the company: *Pennsylvania R. R. Co. v. Parry*, 55 N. J. L. 551; 39 Am. St. Rep. 654. See, also, the extended note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 723.

**INTERSTATE COMMERCE—REGULATION OF.**—A state cannot regulate interstate commerce: *Osborne v. State*, 33 Fla. 162; 39 Am. St. Rep. 99, and note; *Gunn v. White etc. Machine Co.*, 57 Ark. 24; 38 Am. St. Rep. 223, and note; and any attempt by a state to regulate interstate commerce is void as an attempted exercise of a power which has been surrendered by the states to the national government: *Norfolk etc. R. R. Co. v. Commonwealth*, 88 Va. 95; 29 Am. St. Rep. 705, and note.

**INTERSTATE COMMERCE.—TO WHAT EXTENT STATE MAY REGULATE:** See the extended notes to *Norfolk etc. Ry. Co. v. Commonwealth*, 29 Am. St. Rep. 714, and *People v. Wemple*, 27 Am. St. Rep. 547.



**HELBERG v. SCHUMANN.**

[150 ILLINOIS, 12.]

**MORTGAGE—DEED ABSOLUTE IN FORM—EVIDENCE.**—A deed absolute on its face may be shown, by parol, to have been executed for the payment of money; if so it will be treated in equity as a mortgage. Resort may be had to parol evidence in such case, to establish the intention of the parties from their declarations and statements at the time the arrangement was consummated, and the rule that the terms and conditions of a written contract cannot be varied by parol does not apply.

**MORTGAGE—NATURE OF DEBT SECURED BY.**—There can be no mortgage without a debt, to secure which the mortgage is given, but there need be no express promise by the mortgagor to pay the debt. The court may imply the promise from the transaction, and where one person, for his own protection, assumes the debt of another, the indebtedness of the latter to the former is such as may properly be secured by mortgage.

**LUNATICS—CONTRACTS OF—FRAUD.**—Lunatics or insane persons are incapable, for want of capacity, to enter into a valid contract or do any valid act, and all persons dealing with them, with knowledge of their incapacity, are regarded as perpetrating a fraud upon them, and courts of equity will set aside contracts made with such insane persons on the ground of fraud.

**LUNATICS—FORFEITURE AGAINST.**—After one has been adjudged a lunatic no forfeiture of his contract by reason of his failure to pay certain sums of money can be declared against him, unless done by decree of a court of competent jurisdiction, and the lunatic is properly represented by conservator or guardian. An attempted forfeiture, without such decree of court, will be regarded as fraudulent, and be set aside in a court of equity.

**BILL** to redeem, filed by the plaintiff and another, as conservators of Julius Schumann, a lunatic, against the defendant and others. The said Julius Schumann gave a mortgage on land owned by him to secure his note for two thousand dollars, payable to Johann Von der Heide, and afterward sold the north half of the tract of land to his brother Gustav, who assumed payment of one-half the encumbrance, and discharged his half of the indebtedness, including interest. But Julius failed to pay the principal or interest thereon, and, after the death of the said Johann Von der Heide, the note passed into the hands of his administrators, who, failing to obtain payment, filed a bill to foreclose the mortgage, Gustav Schumann being joined as defendant with Julius Schumann. An arrangement was then entered into between the said defendants and the administrators whereby Julius Schumann conveyed, by warranty deed, to Gustav Schumann the entire tract of land for an expressed consideration of fourteen hundred and fifty dollars; and the latter paid the administrators

one hundred and twenty-five dollars cash, and assumed payment of the balance due the estate, giving a mortgage on the land as security. At the same time an agreement to reconvey was made by and between Julius Schumann and Gustav Schumann, the terms of which, together with other facts material to the case, sufficiently appear in the opinion. About six months afterwards Julius Schumann was adjudged insane.

*James F. Monroe*, for the appellants.

*Hofheimer, Zeisler, and Mack*, for the appellees.

20 CRAIG, J. The superior court referred the cause to the master in chancery to take the evidence, and report his conclusions as to both law and fact. The evidence was taken and a report filed, in which the master, among other things, found that the warranty deed from Julius Schumann to Gustav Schumann, and the agreement providing for a conveyance constituted a mortgage, and that complainant was entitled to redeem. Numerous exceptions were filed in the report, a part of which was sustained, a part overruled, and a portion remained undecided, and a decree was rendered dismissing the bill. It will not, however, in the view we take of the case, be necessary to go over the different exceptions in detail. We will therefore content ourselves with considering the questions presented by the record, which must control the decision of the case.

It is claimed, on the one hand, that the transaction wherein Julius Schumann conveyed the land to Gustav Schumann and executed a contract to reconvey amounted to a purchase 21 by Gustav Schumann and a contract to resell, while, on the other hand, it is claimed that the transaction was a mortgage. Parol evidence was introduced for the purpose of showing the intention of the parties at the time the arrangement was consummated. The law is well settled, in a case of this character, that resort may be had to parol evidence to establish the intention of the parties: *Preschbaker v. Feaman*, 32 Ill. 481; *Ennor v. Thompson*, 46 Ill. 220; *Darst v. Murphy*, 119 Ill. 343. The declarations and statements of the parties made pending the negotiations and at the time of the final execution of the deed and contract are admissible, and the rule that the terms and conditions of a written contract cannot be varied does not apply to such evidence. The law is well settled that a deed absolute on its face may be shown by parol to have been executed for the payment of money,

when it will be treated in equity as a mortgage: *Miller v. Thomas*, 14 Ill. 430.

The warranty deed from Julius Schumann to Gustav Schumann, and the contract for a reconveyance, and the note and trust deed given by Gustav Schumann to the administrators of the estate of Johann Von der Heide to secure thirteen hundred and ten dollars, were all executed at the same date, in pursuance of the same agreement, and they are all a part of the same transaction, and "they must be taken together as constituting one entire arrangement" or contract. When they are all considered together as one contract, in connection with the circumstances under which they were executed, we are inclined to the view that but one construction can be placed on the transaction, and that is, that it was a mortgage. Julius Schumann was indebted to the administrators of the estate of Johann Von der Heide in a certain sum of money. This was secured by a mortgage on his land and the land of Gustav, his brother. A bill was filed to foreclose the mortgage. If a decree should be rendered, Gustav's land was liable to be sold in payment of the debt, and he had no indemnity or security of any character from Julius to make him whole. He was therefore interested <sup>22</sup> to have some arrangement made under which he could be secured. The administrators agreed to extend the time of payment, and take a new note and mortgage on all the land for the debt, the interest to be increased from six to seven per cent, and the costs paid. In order that Gustav might make the mortgage and at the same time be secure Julius conveyed the land to him, and he executed a note and mortgage for the debt, and then gave Julius a contract to reconvey, providing he paid the mortgage debt, interest, and the one hundred and twenty-five dollars advanced by Gustav from his own funds. This, in brief, was the transaction, and, when analyzed, it amounts merely to this: that Gustav Schumann assumed the mortgage debt which Julius Schumann owed the administrators, and the latter, in order to secure Gustav, conveyed him his half of the land, under an agreement that the land should be reconveyed upon payment of the debt, interest, and costs. The agreement for a reconveyance contains no provision or recitation that Gustav Schumann has sold the land to Julius Schumann. It merely provides, after reciting the facts under which Gustav Schumann obtained the title, that if Julius Schumann paid as therein provided, then Gustav should reconvey to him.

George W. Bowman, who filed the bill to foreclose the deed of trust for the administrators of the estate of Johann Von der Heide, deceased, testified that "about ten days after the bill was filed Gustav Schumann, in company with his brother, Julius Schumann, called at my office in Blue island. Gustav said they came for the purpose of seeing whether they could not make some arrangement for an extension of the loan, and a settlement of the then pending suit. Gustav Schumann informed me at that time that he was going to help his brother out, and that he would advance him sufficient money to make a payment on this indebtedness secured by the trust deed which we were then foreclosing. He desired to know whether I could help them to make a settlement. I told him I could only take full payment of the debt, and advised him to see <sup>28</sup> the administrators. He said he would, and they left. They returned the same evening, and Gustav informed me that Mr. Guenther had told them that if they paid all the costs in the suit then pending and the attorney's fees, and made a new note and trust deed covering the entire property, for what was then due, and included in that note a judgment recovered against Julius by the administrators, and increased the interest from six to seven per cent, he would give them an extension of time. He inquired the amount of the costs. He then asked me what kind of security he would be able to get for his money which he was about to advance. I told him that he could obtain a second mortgage on Julius Schumann's share. A few days after that Gustav came to see me again. He then informed me that he was dissatisfied with the arrangement of obtaining a second mortgage on his brother's interest. He said that he doubted very much whether his brother would ever pay that indebtedness, and he did not want to be put to the expense of a foreclosure suit in case his brother made default. Then it was for the first time that we discussed together the question of making an absolute deed from Julius Schumann and his wife to Gustav, and a trust deed back from Gustav to secure the Von der Heide indebtedness, and the giving by Gustav to Julius of a contract to reconvey to him the property, to be deeded by him to Gustav in case Julius made the payments as provided in the trust deed to be given to secure the Von der Heide indebtedness, and also this indebtedness for the money to be advanced by Gustav. The result of that conversation was that within a short time I drew up the contract

[the contract here involved.] A day was set for the execution of the papers. On the day fixed, Gustav Schumann came to the office, I think somewhere about 7 o'clock in the evening. He informed me that the parties would be there in a short time. He asked me whether I had the contract drawn up from him to Julius. I told him I had. He told me to be sure to make the provisions in that contract stringent, <sup>24</sup> because he did not want to have any trouble of a foreclosure suit in case his brother did not pay promptly when he ought to pay." After detailing the fact of the execution of the warranty deed, the contract for a reconveyance, and the new trust deed, the witness further testified: "I never proposed to Gustav Schumann that he should buy any portion of Julius Schumann's land involved in this suit. The question of his buying any portion of the land, or the whole of it, never came up in my presence. The question of a sale of that land to him was never discussed."

This witness was entirely disinterested, and was in a position to know and understand the facts connected with the transaction better than any other person. He was familiar with all that was said and done from the inception of the transaction until its final consummation, resulting in the execution of the papers, and we think much reliance should be placed on his evidence.

From the evidence of this witness, and from the papers that were executed, it seems plain that the transaction was a mortgage. If Julius Schumann sold the land to his brother no necessity existed for the execution of a contract providing for a reconveyance containing stringent provisions as Gustav insisted should be inserted in the contract. If the evidence of this witness be true a sale of the property was never mentioned or discussed. Gustav Schumann, in order to protect his own property, which was embraced in the deed of trust to the administrators, concluded to assume the indebtedness, and as security the deed was made to him. When the negotiations first commenced the understanding was that a second mortgage should be given, but finally finding Julius would not pay promptly the deed was made to save the trouble and expense of a foreclosure in case there was a default in payment.

But it is said there was no debt to be secured, and there can be no mortgage in the absence of a debt, and in support of this position *Rue v. Dole*, 107 Ill. 275, and *Fisher v. Green*,

<sup>25</sup> 142 Ill. 80, and other like cases, are cited. If there was no other evidence in this case but the warranty deed and the contract to reconvey there might be much force in the position of counsel; but when the other evidence in the record is considered in connection with the deed and contract a different question is presented. When all the evidence is considered it cannot be said there was no debt to be secured. Gustav Schumann paid the costs on the suit brought by the administrators to foreclose their deed of trust, amounting to one hundred and twenty-five dollars, and assumed the payment of the mortgage debt, amounting to thirteen hundred and ten dollars. The deed was made by Julius to Gustav Schumann as security for these two items, and the plain import of all that was done is that Julius Schumann was to pay those sums, and interest. There was, therefore, a debt which might properly be secured by mortgage.

It is also insisted that Julius Schumann failed to pay as required by the contract, and hence a specific performance of the contract cannot be decreed. The note for thirteen hundred and ten dollars which Gustav Schumann executed and delivered to the administrators was payable five years after date, with interest payable semi-annually. At what time the one hundred and twenty-five dollars should be repaid does not seem to be specified. Julius Schumann failed to pay the interest that became due on July 21, 1888, and January 21, 1889, and also taxes on the land, but no forfeiture of the contract was declared, nor was any attempt made to terminate the contract on account of this failure. On the eighteenth day of July, 1889, before another installment of interest became due, he was adjudged insane, and his failure to pay interest or taxes after that date would not authorize Gustav Schumann to declare a forfeiture of the contract, unless done by decree of a court of competent jurisdiction, where the insane person was properly represented by conservator or guardian. Courts of equity will set aside contracts made with insane persons on the ground of fraud. Insane persons being incapable, for the want of capacity to enter into a valid contract, or do any <sup>26</sup> valid act, all persons dealing with them with knowledge of their incapacity are regarded as perpetrating a fraud upon them: 1 Story's Equity Jurisprudence, sec. 227.

In *Encking v. Simmons*, 28 Wis. 273, where a mortgage with power of sale was foreclosed, under the power of sale contained

in the mortgage, after the mortgagor had become insane, it was held that the sale should be set aside for fraud. In the opinion it is said: "In equity the proceeding was fraudulent, and the sale will be set aside, whether the mortgagee knew of the mortgagor's insanity or not. This will always be done where it is for the benefit of the person *non compos mentis*, and where injustice will not thereby be done to the other parties to the transaction, or they can be placed *in statu quo*. No injustice will be done here. The plaintiff (the purchaser at the sale) will be entitled to the redemption money so far as that goes, and for the rest he has the bond or covenant of the mortgagor for repayment. The mortgagee will have the full amount of his debt and interest, which is all he can require. The parties may be placed *in statu quo*. In equity this seems to fall within the third kind of fraud enumerated by Lord Hardwicke in *Chesterfield v. Janssen*, 1 Lead. Cas. Eq. 472, namely, fraud which must be presumed from the circumstances of the parties, and which goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the court of chancery to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance." So, here, the attempted forfeiture by demanding and obtaining possession of the premises from the wife of Julius Schumann, after he had been adjudged insane, must be regarded as fraudulent, and we think complainant, on making full payment of all moneys agreed to be paid, and interest and taxes, was entitled to relief in equity.

The decree will be reversed, and the cause remanded.

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**MORTGAGE.—PAROL EVIDENCE TO CONVERT A DEED ABSOLUTE IN FORM** into a mortgage is inadmissible in the absence of an allegation of fraud or mistake: *Crutcher v. Muir*, 90 Ky. 142; 29 Am. St. Rep. 366, and note, with the cases collected. See the notes to *Mahoney v. Bostwick*, 31 Am. St. Rep. 180; *Maanix v. Purcell*, 15 Am. St. Rep. 584, and the extended note to *Thompson v. Patton*, 15 Am. Dec. 47.

**INSANE PERSONS—LIABILITY ON CONTRACTS.**—Contracts made with a lunatic or person of unsound mind after inquisition and confirmation thereof are absolutely void: *Hughes v. Jones*, 116 N. Y. 67; 15 Am. St. Rep. 386, and note; *L'Amoureux v. Crosby*, 2 Paige, 422; 22 Am. Dec. 655, and note; *Pearl v. McDowell*, 3 J. J. Marsh. 658; 20 Am. Dec. 199, and note; *Cocke v. Montgomery*, 75 Iowa, 259. A lunatic or person of actually unsound mind cannot bind himself civilly, and, where insanity is proved, all question as to the validity of contracts made by him during the period of insanity is at an end: *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431, and note. See,



also, the notes to *Sims v. McLure*, 70 Am. Dec. 200; *Behrens v. McKenzie*, 92 Am. Dec. 432; *Hovey v. Chase*, 83 Am. Dec. 523; *Allis v. Billings*, 39 Am. Dec. 749, and the extended notes to *Jackson v. King*, 15 Am. Dec. 361, and *Lancaster County Bank v. Moore*, 21 Am. Rep. 33.

EQUITY WILL SET ASIDE THE CONTRACTS OF LUNATICS on the ground that fraud has been practiced upon them: *Sims v. McLure*, 8 Rich. Eq. 286; 70 Am. Dec. 196; *Owing's case*, 1 Bland, 370; 17 Am. Dec. 311.

## CARLTON v. PEOPLE.

[160 ILLINOIS, 181.]

**CRIMINAL LAW—SUFFICIENCY OF PROOF.**—In criminal cases there must be proof of the *corpus delicti*, and of the identity of the prisoner. It must be shown that the act itself was done, and that it was done by the person charged.

**CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY OF.**—In both criminal and civil cases a verdict may be founded on circumstances alone, and the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Absolute certainty is not essential to proof by circumstances, and if they produce moral certainty to the exclusion of every reasonable doubt, it is sufficient.

**CIRCUMSTANTIAL EVIDENCE—CONVICTION OF CRIME.**—To warrant a conviction of crime on circumstantial evidence, the circumstances taken together should be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis.

**CIRCUMSTANTIAL EVIDENCE.—AVERRING CIRCUMSTANCES WHICH MAY BE JUDICIALLY CONSIDERED,** as leading to well-grounded presumptions, are motives to crime, declarations or acts indicative of guilty consciousness or intention, and preparations for the commission of crime.

**EVIDENCE—REASONABLE DOUBT.**—A reasonable doubt must be actual and substantial as contradistinguished from a mere, vague apprehension, and must arise out of the evidence introduced. And the jury may be said to entertain a reasonable doubt when, after the entire comparison and consideration of all the evidence, they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge.

**EVIDENCE—REASONABLE DOUBT—PROOF TO A MORAL CERTAINTY.**—The two phrases, "proof beyond a reasonable doubt," and proof "to a moral certainty," are synonymous and equivalent, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.

**CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTION AS TO.**—On the trial of the accused for arson an instruction that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not to any particular fact in the case," is not erroneous.

**CRIMINAL LAW—PROOF ON INDICTMENT FOR ARSON.**—In order to convict on an indictment for arson, the main fact to be proven, in the first place, is the burning of the building, and, when that is established, it is then necessary to show how the act was done, and by whom. The act itself being thus proved, a foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused, and that it was done with criminal intent, and such evidence may be circumstantial in its character.

**CRIMINAL LAW—EVIDENCE—FOOTPRINTS.**—On the trial of a person for arson evidence of footprints near the burned building and their correspondence with the defendant's feet is admissible with other proof, as tending to make out a case, though not by itself of any independent strength.

**CRIMINAL LAW—COMPETENCY OF EVIDENCE FOR ACCUSED.**—It is competent for the accused to show, by any legal evidence, that another committed the crime with which he is charged, and that he is innocent of any participation in it, but he cannot do this by the admissions or confessions of a third person not under oath. There must be proof of such a train of facts and circumstances as tend clearly to point to such other, rather than to the accused, as the guilty party.

**THREATS OF A THIRD PERSON**, other than the prisoner on trial, against the victim of the crime charged are mere hearsay, and are inadmissible in evidence.

**CRIMINAL LAW—ALIBI—PROOF IN SUPPORT OF.**—In order to establish an *alibi* in a criminal case the burden of proof is upon the accused to show facts and circumstances sufficient, when considered with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him.

**INSTRUCTIONS.**—A DEFENDANT CANNOT COMPLAIN OF THE REFUSAL OF AN INSTRUCTION if its substance is embodied in instructions which are given, and in so holding the appellate court does not necessarily hold such given instructions to be correct.

*Morris and Moore, and S. A. Vankirk*, for the plaintiff in error.

*M. T. Moloney*, attorney general, and *George B. Gillespie*, state's attorney, for the people.

184 MAGRUDER, J. This is an indictment against the plaintiff in error for arson. The indictment charges him, in the usual form, with setting fire to and burning the barn of one Rob Roy Ridenhour. The jury found him guilty, and fixed his punishment at imprisonment in the penitentiary for a term of four years. Motions for new trial and in arrest of judgment were made and overruled. Judgment was rendered and sentence pronounced in accordance with the verdict.

On the afternoon of Saturday, April 9, 1892, plaintiff in error was arrested for the violation of a town ordinance at Vienna, in Johnson county, by the town marshal, assisted by one of the deputy sheriffs, and also by the said Ridenhour. He was taken to the county jail in an intoxicated condition,

having a knife in his hand and a revolver in his pocket. He and Ridenhour each lived in the country about four and a half miles from Vienna, and had ridden into town together on the morning of that day. His arrest was made with difficulty and after a scuffle. By direction of Ridenhour his knife and revolver were taken away from him. While he was lying upon his back in the hallway of the jail, his arms and feet being held by those who arrested him, he said: "Oh, yes! Bob Ridenhour, you live in the country, and you will think of this, god damn you, when your barn is on fire." He repeated the remark several times, varying the expression, saying, according to one witness: "You will think of this when you see your barn in flames"; according to another: "You will think of this when your barn is burned; your barn is on a high hill; it will look well when it is burning." He was released from jail between 10 and 11 o'clock on the night of that same day, and left town about 11 o'clock in company with Thomas Verhines and Edward Hogg, each of the three riding on horseback. The plaintiff in error stopped on the way at the house of Mrs. Bridges, and obtained some matches. They rode together <sup>185</sup> about a mile when they separated, Verhines going east, and Carlton and Hogg going south. Plaintiff in error and Hogg continued to ride together about a mile further, when they separated, the former going southeast and the latter going southwest; the home of Carlton was about two miles, and that of Hogg about two and a half miles, from the point where they separated. In going to his home from this point plaintiff in error would pass in sight of Ridenhour's house. Ridenhour's barns were burned that night. He says that he went to bed between 10 and 11 o'clock, and that it was after midnight when he first saw the fire. On the next day, Sunday, April 10th, an examination was made of the premises. Tracks were found south of the barn in a path leading to the highway, which ran in the general direction of the house of plaintiff in error. Mud was found upon the fence at the corner of the field, indicating that some one had climbed over the fence. The oats in the field had not come up. An examination of the tracks showed that one foot had made a deeper impression than the other. Carlton was arrested on that Sunday afternoon. A measurement of the tracks showed that they corresponded in length with tracks made by Carlton in the road on that day, and with the shoes worn by him on that afternoon. It was proven that he was

lame, and walked with "a kind of hop." One of the witnesses says: "The foot he limped on corresponded to the irregular tracks in the field." Two barns were burned containing corn, hay, mules, and horses. The horses escaped, but one of the mules was burned to death, and the corn and hay were destroyed. Hogg says that he saw no fire when he passed with Carlton.

The only evidence introduced on the defense seems to have had for its object the proof of an *alibi*. The testimony tends to show that the barns were on fire after midnight and somewhere about 1 o'clock, though one of the witnesses says he saw the fire at 4 o'clock in the morning, and when he saw it went to it from his house, a half mile distant, and found the <sup>186</sup> barns "pretty well all burned down." The evidence does not certainly fix the hour when the plaintiff in error reached his home on the night of the fire. His mother swore that "it was about 12 o'clock or near that." One of his sisters swore that she heard the clock strike 12, and another that she heard it strike 1, after his arrival.

Counsel for plaintiff in error make the general objections, that there is an absence of evidence relative to the *corpus delicti*, and that the evidence is purely circumstantial. "The proof of the charge in criminal causes involves the proof of two distinct propositions: 1. That the act itself was done; and 2. That it was done by the person charged, and by none other; in other words, proof of the *corpus delicti* and of the identity of the prisoner": 3 Greenleaf on Evidence, sec. 30. Here, the act done, which was to be proven, was the burning of the barn. It was also required to be proven that the barn was burned by the plaintiff in error, and that such burning was done with felonious intent, or, in the language of the statute, "willfully and maliciously": 1 Starr and Curtis' Ann. Stats., 759; 3 Greenleaf on Evidence, secs. 55, 56. It has been said that, in arson, the *corpus delicti* consists not only of the fact that a building has been burned, but also of the fact that it has been willfully fired by some responsible person: *Winslow v. State*, 76 Ala. 42. The main fact, however, which is to be proven in the first place is the burning of the building. When that fact is established, then it is necessary to show how the act was done, and by whom. We think that, in the present case, the fact that the barns were burned was clearly and satisfactorily proven; and the circumstances were such as to exclude accident or natural causes

as the origin of the fire. When the general fact is thus proved a foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused, and that it was done with criminal intent: *Sam v. State*, 33 Miss. 347; *Phillips v. State*, 29 Ga. 105. Such evidence need not be direct and positive, but may <sup>187</sup> be circumstantial in its character: *Winslow v. State*, 76 Ala. 42. In both criminal and civil cases "a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce": 1 Greenleaf on Evidence, sec. 13 a.

After a careful examination of the evidence in this case we are not prepared to say that the jury were not warranted in finding the verdict returned by them. Among the circumstances which may be judicially considered as leading to important and well-grounded presumptions, are "motives to crime, declarations or acts indicative of guilty consciousness or intention, preparations for the commission of crime": *Wills on Circumstantial Evidence*, 39. It appears from the facts above recited that there was evidence here which tended to show the existence of just such circumstances as are thus indicated—revenge for arrest and imprisonment, threats that the barns would be burned, halting on the way to obtain matches. The evidence of the footprints and their correspondence with the defendant's feet was competent, and though "not by itself of any independent strength, is admissible with other proof as tending to make out a case": *Wharton's Criminal Evidence*, 8th ed., sec. 796. In *Winslow v. State*, 76 Ala. 42, where the indictment was for arson, and "there was evidence tending to show a fresh track in the lane leading from the road to the house; [and] that this track and the track of the defendant corresponded," it was said: "The previous threats of the defendant, and his declarations in the nature of threats, were, on the same principle, properly admitted. While they are not of themselves convincing of guilt, from them, in connection with the other circumstances, if believed by the jury, guilt may be a logical sequence": *Wharton's Criminal Evidence*, 8th ed., sec. 756.

As to the defense of an *alibi* the burden of making it out was upon the plaintiff in error: *Ackerson v. People*, 124 Ill. 563. And, in order to maintain it, he was bound to establish <sup>188</sup> in its support such facts and circumstances as were sufficient, when considered in connection with all the other evidence in

the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him: *Garrity v. People*, 107 Ill. 162; *Mullins v. People*, 110 Ill. 42. It cannot be said that the defense was made out so clearly and satisfactorily as to be availing against the case made by the state.

It is assigned as error that the court refused to permit the defendant to prove by two witnesses, that they had heard Thomas Verhines make threats that he would burn up every thing Ridenhour had. We do not regard this ruling as erroneous. Threats of a third person, other than the prisoner on trial, against the victim of the crime charged, are mere hearsay, and are inadmissible. Evidence of this character tends to draw away the minds of the jury from the point in issue, which is the guilt or innocence of the prisoner, and to excite their prejudices and mislead them: 1 Greenleaf on Evidence, secs. 51, 52; *Walker v. State*, 6 Tex. App. 576; *State v. Duncan*, 6 Ired. 236. Such threats of a third person are *inter alios acta*; they are too remote from the inquiry before the jury to be received, and have no legal tendency to establish the innocence of the prisoner: *Alston v. State*, 63 Ala. 178; *State v. Davis*, 77 N. C. 483. It is competent for the defendant to show by any legal evidence that another committed the crime with which he is charged, and that he is innocent of any participation in it, but this cannot be shown by the admissions or confessions of a third person not under oath, which are only hearsay. The proof must connect such third person with the fact; that is, with the perpetration of some deed entering into the crime itself. There must be proof of such a train of facts and circumstances as tend clearly to point to him, rather than to the prisoner, as the guilty party. "Extrajudicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestæ*": 189 Wharton's Criminal Evidence, 8th ed., sec. 225; *Smith v. State*, 9 Ala. 990; *State v. Davis*, 77 N. C. 483; *Greenfield v. People*, 85 N. Y. 75; 39 Am. Rep. 636; *Thomas v. People*, 67 N. Y. 218; *Owensby v. State*, 82 Ala. 63; *State v. Haynes*, 71 N. C. 79; *Rhea v. State*, 10 Yerg. 258; *Commonwealth v. Chabcock*, 1 Mass. 144; *State v. Johnson*, 30 La. Ann. 921; *People v. Murphy*, 45 Cal. 137; *State v. Smith*, 35 Kan. 618; *State v. May*, 4 Dev. 328; *Wright v. State*, 9 Yerg. 342.

It is assigned as error that the court instructed the jury that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the

evidence, and not as to any particular fact in the case." We do not regard the doctrine of the instruction as erroneous. It is in accordance with the rule which we have laid down in a number of cases: *Mullins v. People*, 110 Ill. 42; *Davis v. People*, 114 Ill. 86; *Leigh v. People*, 113 Ill. 372; *Bressler v. People*, 117 Ill. 422; *Hoge v. People*, 117 Ill. 35.

There was no error in refusing the defendant's third refused instruction, because instructions given for the state and for the accused required the jury to believe from the evidence, beyond a reasonable doubt, that the defendant willfully and maliciously burned the barn of Ridenhour.

Complaint is made that the court refused to instruct the jury as follows: "If the jury entertain any reasonable doubt as to whether or not the defendant was at his own home, or at the scene of the alleged offense at the time such offense was committed, then it is your duty under the law to acquit him." Such an instruction was held to be incorrect in *Mullins v. People*, 110 Ill. 42. The reasonable doubt of guilt, which will acquit the prisoner, when his defense is an *alibi*, is the doubt which arises from a consideration by the jury of all the evidence, "as well that touching the question of the *alibi*, as the criminating evidence introduced by the prosecution": *Mullins v. People*, 110 Ill. 42.

<sup>190</sup> In the case at bar fourteen instructions were given for the state and eighteen for the defendant. The jury was instructed in regard to the subject of reasonable doubt in accordance with the principles laid down by this court in *Miller v. People*, 39 Ill. 457; *May v. People*, 60 Ill. 119; *Connaghan v. People*, 88 Ill. 460; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320. We see no reason for departing from the views expressed in these cases.

Counsel for plaintiff in error claim that the trial court erred in refusing to give their refused instruction, No. 17 which is as follows:

"The jury are instructed, as a matter of law, that when a conviction for a criminal offense is sought on circumstantial evidence alone the people must not only show, by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any other theory than that of the guilt of the accused; and in this case, if all the facts and circumstances relied on



by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant they should acquit him.'

In instruction No. 13, given for the people, the court told the jury that circumstantial evidence should be "of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty." In instruction No. 1, given for the defendant, the court instructed the jury that "the defendant is presumed to be innocent until the contrary appears by the evidence, and such evidence must be so strong and convincing as to remove every reasonable doubt of his guilt to the exclusion of every reasonable hypothesis of his innocence." Irrespective of the question whether refused instruction No. 17 was right or wrong, the defendant could not have been injured by its refusal in view of the giving of plaintiff's instruction No. 13 and defendant's instruction No. 1, as above quoted, <sup>191</sup> whether the two-last named instructions were correct or not. A defendant cannot complain of the refusal of an instruction, if its substance is embodied in instructions which are given; and in so holding this court does not necessarily hold such given instructions to be correct.

In addition, however, to this consideration said instruction No. 17 was properly refused, because it is so broad and sweeping in its terms that if it were given in every criminal case dependent upon circumstantial evidence it would have a tendency to prevent, in many instances, the conviction of guilty parties: *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147; Wharton's Criminal Evidence, 8th ed., sec. 10. "What circumstances amount to proof can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. On the one hand, absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty to the exclusion of every reasonable doubt" 1 Starkie on Evidence, sec. 79; *Otmer v. People*, 76 Ill. 149. The circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis: *Commonwealth v. Goodwin*, 14 Gray, 55; 1 Greenleaf on Evidence, sec. 13 a. The jury should be satisfied of the defendant's guilt beyond a reasonable doubt, and if there be no probable hypothesis of guilt consistent, beyond reasonable doubt, with the facts of the case the defendant must be acquitted: *Commonwealth v.*

*Costley*, 118 Mass. 1; Wharton's Criminal Evidence, 8th ed., sec. 21. In order to warrant a conviction of crime on circumstantial evidence the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged: *Commonwealth v. Goodwin*, 14 Gray, 55. It is difficult to define accurately what is a reasonable doubt, but all the authorities agree that such a doubt must be actual <sup>192</sup> and substantial, as contradistinguished from a mere vague apprehension, and must arise out of the evidence introduced: 3 Greenleaf on Evidence, 15th ed., sec. 29, note a; *Earll v. People*, 73 Ill. 329. The jury may be said to entertain a reasonable doubt when, after the entire comparison and consideration of all the evidence, they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge: *Commonwealth v. Webster*, 5 Cush. 320; 52 Am. Dec. 711. Proof "beyond a reasonable doubt" is such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. The two phrases "proof beyond a reasonable doubt," and proof "to a moral certainty," are synonymous and equivalent. "Each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible": *Commonwealth v. Costley*, 118 Mass. 1.

The judgment of the circuit court is affirmed.

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**CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY OF.**—It is not necessary to prove by direct evidence that a party advised an act or aided in its commission, but such facts may, like any others, be established by circumstantial evidence: *Willi v. Lucas*, 110 Mo. 219; 33 Am. St. Rep. 436. Circumstantial evidence in criminal cases is competent, and is sometimes the only mode of proof: *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711. A party may be convicted on circumstantial evidence, and it is often necessary to resort to that species of evidence: *State v. Milling*, 35 S. C. 16. See, also, the extended note to *Riphey v. Miller*, 62 Am. Dec. 179.

**CIRCUMSTANTIAL EVIDENCE—PROOF.**—Each necessary link in the chain of evidence must be proved beyond reasonable doubt to sustain a verdict of guilty in a criminal case resting upon circumstantial evidence: *People v. Aiken*, 66 Mich. 460; 11 Am. St. Rep. 512; *Sumner v. State*, 5 Blackf. 579; 36 Am. Dec. 561; *Horne v. State*, 1 Kan. 42; 81 Am. Dec. 499, and note; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, and note. See,

also, the extended notes to *State v. Williams*, 78 Am. Dec. 253, and *Ripsey v. Miller*, 62 Am. Dec. 182.

**CRIMINAL LAW—SUFFICIENCY OF PROOF.**—Every material circumstance must be proved beyond a rational doubt to justify a conviction in a criminal case, and every circumstance not so proved should be discarded in making up the verdict: *Sumner v. State*, 5 Blackf. 579; 36 Am. Dec. 561, and note.

**REASONABLE DOUBT** is doubt for which a good reason arising from the evidence can be given: *Hodge v. State*, 97 Ala. 37; 38 Am. St. Rep. 145, and note, with the cases collected.

**REASONABLE DOUBT AND MORAL CERTAINTY.**—**DEFINITIONS OF:** See the extended note to *Ripsey v. Miller*, 62 Am. Dec. 183.

**EVIDENCE—FOOTPRINTS.**—The character of footprints found where the crime is discovered leading to or from the place of the crime, and their correspondence with the feet of the accused, or with shoes worn by or found in his possession, are admissible in evidence to identify him as the guilty party: *Hodge v. State*, 97 Ala. 37; 38 Am. St. Rep. 145, and note, with the cases collected.

**ALIBI—PROOF OF.**—The evidence relied on to establish proof of an *alibi* must be sufficiently clear and convincing to satisfy the jury that the preponderance of evidence is in favor of the *alibi*, but it need not be sufficient to remove all reasonable doubt thereof: *State v. Jackson*, 36 S. O. 487; 31 Am. St. Rep. 890, and note. See, also, the note to *Sharp v. State*, 14 Am. St. Rep. 41-44.

**ARSON.**—**PROOF OF:** See the notes to *Sprague v. Dodge*, 95 Am. Dec. 526, and *Mary v. State*, 81 Am. Dec. 70.

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## TRADERS' INSURANCE COMPANY v. PACAUD.

[150 ILLINOIS, 245.]

**INSURANCE—RIGHT OF ACTION ON POLICY.**—Where a party contracts for the insurance of property, and pays the premium, and the loss is made payable to him, the agreement to pay the loss is a contract with the person who pays the consideration, and he has a right of action in his own name for the loss, although the insurance is in the name of another.

**INSURANCE—INSURABLE INTEREST.**—M. and B. were engaged in the grain business, and the elevator where the business was transacted, and the ground upon which it was located, were owned by M. B. advanced no money to carry on the business, but, under an arrangement with M., was to have charge of the business at the elevator, and receive one-half of the profits as a salary. In such case B's liability with M. to the owners of grain stored in the elevator to hold and ship the grain to them or their order, as provided in the warehouse receipts, and his right to share in the profits in payment of his salary, constitute an insurable interest in the property, upon which he could take out a policy for his own benefit.

**INSURANCE—DISCLOSURE OF INTEREST.**—A policy of insurance was issued to M., of the firm of M. and B., loss payable to P. and Co., as their interest might appear, and conditioned that "if the interest of the assured in the personal property be other than its unencumbered and sole owner-

ship, without such fact being indorsed upon the policy, the same shall be void." The property was stored with the firm of M. and B., warehousemen, B. having no title to the property, but only an interest in the profits of the business of buying and storing grain, and being liable with M. to hold and ship the grain, as provided in the warehouse receipts issued by the firm. It was held in such case that although B. had an insurable interest in the grain stored, his interest was not one which the assured were required to disclose in taking out the policy to protect their own interest.

**INSURANCE—PROVISION FOR APPORTIONMENT OF LOSS.**—A provision in a policy of insurance that in case of any other insurance upon the property insured, made prior or subsequent to the policy, the assured shall be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured therein, applies only to cases where the insurance covers the same interests, and can have no application to insurance obtained upon another distinct insurable interest in the property.

**ACTION** on a policy of insurance brought by Pacaud & Co. against the Traders' Insurance Company. The policy was issued by the defendant, on the application of the plaintiffs, to J. H. Million, of the firm of Million and Bott, who were engaged in the business of buying and shipping grain at Kahoka, and it contained a recital, "loss, if any, payable to A. L. Pacaud & Co., as interest may appear." The policy was taken out to cover the interest of the plaintiffs in the grain in the elevator of Million and Bott at the time of its destruction by fire, and among the conditions therein were the following: 1. That "if the interest of the assured in the personal property be other than its unencumbered and sole ownership, without such fact being indorsed upon the policy, the same shall be void"; 2. "In case of any other insurance upon the property hereby insured, whether valid or not, or made prior or subsequent to the date of this policy, assured shall be entitled to recover of this company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount so insured thereon."

*Schuyler and Kramer*, for the appellant.

*Robert Rae*, for the appellees.

249 **CRAIG, J.** The principal grounds relied upon to reverse the judgment of the appellate court, affirming the judgment of the circuit court, are the following: 1. That the interest of J. H. Million in the property destroyed by fire, and covered by the defendant's policy, was other than its unencumbered and sole ownership, and that he had no insurable

interest therein in his own name; and 2. That the court erred in not instructing the jury that all the insurance on the property at the date of the fire should contribute to the loss, and the plaintiff could only recover from the defendant its proportionate share of such loss.

Under the first point relied upon it is said that the property covered by the insurance was owned by the firm of Million and Bott, and hence the title was not in J. H. Million, and his interest was not of an unencumbered and sole ownership, within the meaning of the policy. While the grain business at Kahoka was transacted in the name of Million and Bott, upon <sup>250</sup> looking into the evidence in the record it will be found that Bott had no real title to the grain covered by the policy. The elevator where the business was transacted, and the ground upon which it was located, were owned by J. H. Million. Bott advanced no money to carry on the business, but, under an agreement with Million, he took charge of the business at the elevator, and was to receive as a salary one-half of the profits realized out of the business. Under this arrangement Bott cannot be regarded as a real owner of the title to one-half of the grain in the elevator at the time the policy issued. His liability with Million to Pacaud & Co. to hold and ship the grain to them or their order, as provided in the warehouse receipts, and his right to share in the profits in payment of his salary, may be regarded as an insurable interest in the property, upon which he could take out a policy for his own benefit. But his interest in the property itself was not one which the plaintiffs were required to disclose when they took out a policy to protect their own interest. Moreover, the provision that the interest of the insured should not be other than an unencumbered and sole ownership in the property insured, in our opinion had no application to Million, but it had reference to the plaintiffs—the parties who were insured by the policy. The plaintiffs held an insurable interest in the property. They applied to the insurance company for insurance. They, and they alone, made the contract and paid the premium, and the policy was delivered to them containing the following provisions: "The Traders' Insurance Company of Chicago, in consideration of eighty-seven dollars and fifty cents, do insure J. H. Million against loss or damage by fire to the amount of three thousand five hundred dollars on grain, the assured's property, or held by the assured in trust or on commission, or sold, but not delivered, while in the Kahoka

elevator at Kahoka, Missouri, loss, if any, payable to A. L. Pacaud & Co., as interest may appear."

While the decisions in the different states may not be entirely harmonious in regard to the person who holds the legal <sup>251</sup> interest, and in whose name an action may be maintained, yet, as we understand the subject, the decided weight of authority is, where the party contracts for the insurance, pays the premium, and the company makes the loss payable to such party, the agreement to pay is a contract with the person who pays the consideration, and he has a right of action in his own name, although the insurance is in the name of another. *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, is a late case on the subject. In *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121, it was held that the person who pays the premium and to whom the loss is payable is the party to sue for the loss. The ground upon which the person to whom loss is payable may maintain a suit in his own name would seem to be predicated on the fact that he has the legal interest in the contract, and in order to have the legal interest in the contract he must be the party insured.

It will be observed that the policy provided that in case of any other insurance upon the property insured, made prior or subsequent to the policy in suit, assured shall be entitled to recover of the company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount so insured therein. It appears from the testimony that Million and Bott had procured insurance on the property in their own names, amounting to some six thousand seven hundred dollars, which was in force at the time of the fire, in addition to the policy held by plaintiffs, and, under the clause of the policy providing for contribution, it is claimed by appellant that plaintiffs could, in no event, recover the full amount of the policy. The plaintiffs had no connection whatever with the policies issued to Million and Bott. Those policies were procured by Million and Bott for their own and sole benefit, and the loss, in case of fire, was payable to them. Under such circumstances, was the appellant entitled to claim an apportionment? The appellant had the right to rely on an apportionment in case of other insurance upon the property. The question resolves <sup>252</sup> itself into this: Was there other insurance upon the property, within the meaning of the policy? We think it plain there was not. We think the provision for apportionment of loss if there should be other

insurance applies only where the insurance covers the same interest. That was not the case here. The plaintiffs insured their interest in the property, and Million and Bott insured their interest. The one was separate and distinct from the other. The case is not different from what it would be if the two parties occupied the relation of mortgagor and mortgagee, where each may insure his own interest, and the insurance obtained by one has no connection with the insurance obtained by the other.

But if there was a doubt in regard to the question, we think it was settled by *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 500. It is there said: "It is to be noted that the provision for an apportionment is only to become operative if there shall be other insurance upon the property, and, as we have seen, insurance which is obtained by a third person, and upon another distinct and insurable interest, cannot be regarded as other insurance. We understand the rule to be, that a provision for apportionment of loss if there is other insurance applies only to cases where the insurance covers the same interest": See, also, *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 415; *Fox v. Phenix Fire Ins. Co.*, 52 Me. 333; Phillips on Insurance, sec. 359.

The policies obtained by Million and Bott were after the fire assigned to the plaintiffs, but that fact has no special bearing on the case.

We find no substantial error in the record, and the judgment will be affirmed.

Mr. Justice BAILEY dissented.

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**INSURANCE—INTEREST OF ASSURED.**—It is not necessary that the insured have an interest, either legal or equitable, in the property insured. It is enough that he is so situated with reference to it that he would be liable to loss should it be injured by the peril insured against: *Berry v. American etc. Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note; *McDonald v. Black*, 20 Ohio St. 185; 55 Am. Dec. 448. See the notes to *Mutual etc. Ins. Co. v. Deale*, 79 Am. Dec. 680; *Bartlet v. Walter*, 7 Am. Dec. 145; *Riggs v. Commercial etc. Ins. Co.*, 21 Am. St. Rep. 720; and especially the extended note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 510.

**INSURANCE—DISCLOSURE OF INTEREST.**—Policies need not disclose the nature of the interest of the assured unless some condition in them requires such disclosure: *Riggs v. Commercial etc. Ins. Co.*, 125 N. Y. 7; 21 Am. St. Rep. 716. The failure of the insured to disclose the nature and extent of his interest in the property insured will not avoid the policy in the absence of fraud: *Morrison v. Tennessee etc. Ins. Co.*, 18 Mo. 262; 59 Am. Dec. 299. In general it is sufficient if the subject matter of the insurance and the nature



of the risk are set forth in the policy, without any representation of the nature or character of the interest for which the insurance is intended as a protection: *Hartford etc. Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684, and note. See, also, the note to *Johannes v. Standard Fire Office*, 5 Am. St. Rep. 162.

## FISHER v. SPENCE

[150 ILLINOIS, 253.]

**WILLS—COMPETENCY OF ATTESTING WITNESSES.**—The competency of attesting witnesses to a will is to be tested upon the state of facts existing at the time of such attestation, and not upon that existing at the time the will is presented for probate. The expression "credible witnesses," as used in the Statute of Wills, means competent witnesses.

**WILLS—WITNESSES—HUSBAND OR WIFE OF DEVISEE OR LEGATEE.**—The husband or wife of one named as devisee or legatee in a will is not a competent witness to prove the execution of the will, even as to devises and bequests made to persons other than to the wife or husband of such witness, and is not rendered competent by a release by the devisee or legatee of all his or her right, title, interest, and claim under the will.

**WILLS—SUBSCRIBING WITNESSES—CONSTRUCTION OF STATUTE.**—Section 8 of the Illinois Statute of Wills provides, in substance, that any beneficial devise, legacy, or interest, made or given to a subscribing witness to the execution of any will, testament, or codicil, shall, "as to such subscribing witness, and all persons claiming under him, be null and void." This provision is construed as having no application to the interests of any persons other than those who are attesting witnesses, and does not declare such interests null and void. Nor does the further provision of the statute assume to render competent any subscribing witnesses other than those to whom a beneficial devise, etc., was made or given.

THE last will and testament of John A. Fisher was witnessed by J. J. Carson and Carrie F. Spence, and the wife of the said J. J. Carson, and the husband of the said Carrie F. Spence, were named as devisees and legatees in the will. The collateral heirs of the testator resisted the probate of the will, claiming it to be void by reason of the incompetency of the attesting witnesses. Before the probate of the will the wife and husband respectively of the subscribing witnesses formally released all benefits under the will, and the court admitted the will to probate as to all of the other devises and bequests therein contained. The contestants appealed.

*L. N. Bradley and Green and Gilbert*, for the appellants.

*Lansden and Leek and Robert and Wall*, for the appellees.

256 BAKER, C. J. The sole question for consideration is, whether or not the said J. J. Carson and Carrie F. Spence are

competent witnesses to said will as to all devises and bequests therein contained, except the devises and bequests to the said Georgia Ann Carson and Thomas W. Spence, the wife and husband of the said subscribing witnesses to said will. It is admitted that at common law, and without any relinquishment or release by the said Georgia Ann Carson and Thomas W. Spence of the interests in the estate given to them by the will, they would not be competent attesting witnesses to such will. It is urged, however, that for two reasons they are now competent witnesses to establish the will. One ground of the contention of appellees is, that even if J. J. Carson and Carrie F. Spence were not competent witnesses at the time of attestation of the will, yet that since, prior to the probate of such will, Georgia Ann Carson and Thomas W. Spence, wife and husband, respectively, of said witnesses, released all interest in the estate, they became and were competent witnesses to establish such will. The other contention of appellees is, that under and by virtue of section 8 of our Statute of Wills the devises and legacies to Georgia Ann Carson and Thomas W. Spence under the will, to which the husband of the one and the wife of the other were the only attesting witnesses, were null and void, and such husband and wife competent witnesses as to the residue of such will.

It is provided in section 2 of the Statute of Wills that all wills, testaments, and codicils shall be "attested in the presence <sup>257</sup> of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present, and saw the testator or testatrix sign said will, testament, or codicil in their presence, or acknowledge the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of the said will, testament, or codicil to admit the same to record." The expression in the statute, "credible witnesses," means competent witnesses: 1 Greenleaf on Evidence, 272; North's Probate Practice, sec. 44; *Workman v. Dominick*, 3 Strob. 589; *In the Matter of Noble*, 124 Ill. 266.

The material question upon the claim of appellees first above mentioned is, Whether the competency of attesting witnesses to a will is to be tested upon the state of facts existing at the time of such attestation, or upon those exist-

ing at the time such will is presented for probate. In our opinion the decided weight of the more modern authorities is in favor of the former proposition. In 2 Greenleaf on Evidence (sec. 691) it is said: "The attesting witnesses are regarded in the law as persons placed around the testator in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity. They must therefore be competent witnesses at the time of the attestation, otherwise the will is not well executed." He further says, in a note, that such was the opinion of Lord Camden, and that such opinion is now acquiesced in as the true exposition of the Statute of Wills, and he also cites in the note a number of authorities sustaining the doctrine announced in the text. In North's Probate Practices (sec. 44) it is said: "As to the period at which the witnesses must be competent the weight of the authorities is clearly that it must be at the time of the execution." In Schouler on Wills (sec. 351) it is said that the rule which reason should now pronounce the universal one is, that <sup>258</sup> the competency of witnesses to a will like that of the testator is tested by one's *status* at the time when the will was executed: See, also, *Patten v. Tallman*, 27 Me. 27; *Morton v. Ingram*, 11 Ired. 368; *Huie v. McConnell*, 2 Jones, 455; *Vrooman v. Powers*, 47 Ohio St. 191; *Workman v. Dominick*, 3 Strob. 589; *Pease v. Allis*, 110 Mass. 157; 14 Am. Rep. 591. The views above expressed seem to be supported by the decision of this court in *In re Will of Ingalls*, 148 Ill. 287. Without mentioning numerous other authorities to the same effect, we may say that our conclusion is that J. J. Carson and Carrie F. Spence were not rendered competent witnesses to the will in question by the releases which were executed by the wife of the one and the husband of the other, releasing all benefits under such will.

As above stated, the other claim of appellees is, that by section 8 of the Statute of Wills the devises and legacies to the wife of one and husband of the other of the attesting witnesses to the will are null and void, and therefore said attesting witnesses competent witnesses as to the residue of the will. Said section 8 is as follows:

"If any beneficial devise, legacy, or interest shall be made or given in any will, testament, or codicil to any person subscribing such will, testament, or codicil as a witness to the execution thereof, such devise, legacy, or interest shall, as to such subscribing witness, and all persons claiming under

him, be null and void, unless such will, testament, or codicil be otherwise duly attested by a sufficient number of witnesses exclusive of such person, according to this act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament, or codicil, in like manner as if no such devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate in case the will, testament, or codicil was not established, then so much of such share shall be saved to such witness as shall not exceed the value of the said devise or bequest made to him or her, as aforesaid."

<sup>359</sup> It is to be noted that it is only the beneficial devise, legacy, or interest that is made or given to a subscribing witness to the execution of any will, testament, or codicil that is declared by the language of this statute to "be null and void." In order to hold that this statute has any application to the present case it would be necessary to read into the statute a provision that any devise or legacy to the wife or husband of a subscribing witness shall be null and void. The ground assumed by appellees, and in the authorities upon which they rely, is, that the statute ought to receive a liberal construction in support of the will, and that on account of the unity of husband and wife, in legal contemplation, it should be held that it is the intent of the statute that if either husband or wife is a witness to a will containing a devise or a legacy to the other, then such devise or legacy is null and void.

In *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445, it was held that while it was the duty of the courts to give to all words, clauses, and phrases found in a statute a liberal construction, in order to carry out the legislative intention, yet courts have no power to inject provisions into the statute which were omitted by the lawmakers. The difficulty that we encounter in respect to the argument made by appellees is, that it does not appear from the statute under consideration that the legislature acted, or assumed to act, in regard to the interests of any persons other than those who are attesting witnesses to wills, and declare such interests null and void, or assumed to render competent any subscribing witnesses other than those to whom a beneficial devise, legacy, or interest was made or given.

In *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356, the Massachusetts statute was that "all beneficial devises legacies, and gifts made or given in any will to a subscribing

witness thereto shall be wholly void, unless there are three other competent witnesses to the same," and it was held that a wife is not a competent attesting witness to a will which contains a devise to her husband. In the opinion of the court, delivered by <sup>260</sup> Gray, J., it was said: "The only devises which the statute declares to be void are beneficial devises to a subscribing witness. It does not avoid even a devise to a subscribing witness which gives him no beneficial interest, as, for instance a devise to an executor, for the exclusive benefit of other persons: *Wyman v. Symmes*, 10 Allen, 153; 1 Jarman on Wills, 65. It does not avoid any devise to and for the benefit of any person other than a subscribing witness, even if the subscribing witness would incidentally take some benefit from the devise. In order to maintain the position contended for it would be necessary to declare void, not merely the interest which the wife, who was a subscribing witness, would take, by way of dower or otherwise, in the property devised to her husband, but also the whole devise to and for the benefit of the husband himself, who was not a subscribing witness, and whose estate the statute does not assume to reach."

In *Fortune v. Buck*, 23 Conn. 1, it was said: "That the wife was an interested subscribing witness, and incompetent to sustain the will in favor of her husband, if objected, while the probate of the will was under consideration, we can well see; but how a person, whether a wife or not, can be treated as a devisee to whom nothing is devised, where no statute provides, is not so easily perceived."

Section 8 of our Statute of Wills is substantially the same as the statute of 25 George II. c. 6. Our attention is called to *Holdfast v. Dowsing* (sometimes cited as *Antsey v. Dowsing*), 2 Strange, 1253. In that case Dowsing was devisee of certain lands charged with the payment of an annuity to the wife of one of the witnesses to the will, and it was held, among other things, that the charge upon the real estate of the annuity to the wife made the husband an incompetent witness. The case, although an authority as to what the law is in the absence of any statute, cannot be regarded an authority as to the interpretation to be given to section 8 of our Statute of Wills, for the reason it was decided prior to the statute of 25 George II., c. 6.

<sup>261</sup> Attention is also called to the case of *Hatfield v. Thorp*, 5 Barn. & Ald. 589. The case does not seem to be in point

in respect to the question here in issue. The case was that one John Steemson devised a certain messuage, garden, and premises to his daughter, Mary Bell, for life, remainder to Elizabeth Hatfield in fee, and one of the necessary witnesses to the will was the husband of said Elizabeth Hatfield. The master of the rolls certified the case to the court for its opinion whether the will was duly attested to pass any estate to Elizabeth Hatfield. The opinion of the court was confined strictly to the question certified to it, and was as follows: "This case has been argued before us, and we are of opinion that the will of the said John Steemson was not duly executed so as to pass any real estate in the messuage, garden, and premises to Elizabeth Hatfield." The question whether or not the will was so attested as to pass any estate to Mary Bell, the daughter of John Steemson, was not submitted to the court or passed upon by it. It seems to us that there is no necessary implication from the opinion that the court held that the statute of 25 George II. either did or did not apply to the case. However, in 1837, parliament, by the statute of Victoria, c. 26, extended the disqualification to take beneficially under a will to the husband or wife of the attesting witness, and this seems to be a recognition of the fact that legislation further than that contained in the statute of 25 George II. was necessary in order to render null and void a beneficial devise or legacy to the wife or husband of an attesting witness to a will, and make such witness a competent witness as to the residue of the will.

Appellees contend that the unity of husband and wife is such, in legal contemplation, as that if either be a witness to a will containing a devise or a legacy to the other, such devise or legacy is void, within the intent of our Statute of Wills, and this contention is supported by decisions of the courts in New York and Maine, made under statutes substantially like ours: *Jackson v. Woods*, 1 Johns. Cas. 163; *Jackson v. <sup>262</sup> Durland*, 2 Johns. Cas. 314; *Winslow v. Kimball*, 25 Me. 493. After much consideration we are inclined to concur in the views expressed in *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356, in regard to said cases. It is there said: "With great respect for the learning and ability of the courts which made those decisions, and after carefully weighing the arguments in support of the construction contended for, we are unanimously of opinion that it is founded rather upon a conjecture of the unexpressed intent of the

legislature, or a consideration of what they might wisely have enacted, than upon a sound judicial exposition of the statute by which their intent has been manifested."

It may be suggested that the legacy and devise to Georgia Ann Carson, the wife of J. J. Carson, were the separate property of the wife, and that under section 5 of our Statute of Evidence and Depositions the husband is a competent witness respecting the separate property of the wife. A sufficient answer to this would be, that it is expressly provided in section 8 of that statute that nothing in the statute contained shall in any manner affect the existing laws relating to the settlement of the estates of deceased persons, or to the attestation of the execution of last wills and testaments. Besides this, even if under said section 5 J. J. Carson was a competent witness to the will, the incompetency of the other witness, Carrie F. Spence, would not be removed, and under our Statute of Wills two or more credible or competent witnesses are required to a will.

In our opinion the county court and the circuit court were in error in holding that J. J. Carson and Carrie F. Spence were competent witnesses to establish the will of John A. Fisher, deceased, and in admitting said will to probate as to all the devises and bequests therein contained, other than those to Georgia Ann Carson and Thomas W. Spence. The judgments and orders of said courts are therefore reversed.

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**WILLS—COMPETENCY OF ATTESTING WITNESS.**—The term "credible witness," as applied to an attesting witness to a will, means a witness who was competent at the time of the attestation: *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666. The witness must be competent at the time of the attestation: *Hawes v. Humphrey*, 9 Pick. 350; 20 Am. Dec. 481, and note.

**WILLS—EFFECT OF INTEREST OF ATTESTING WITNESS.**—A wife is not a competent witness to a will containing a devise to her husband: *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356. A will must be subscribed by at least two disinterested witnesses: *Simmons v. Leonard*, 91 Tenn. 163; 30 Am. St. Rep. 875, and note, with the cases collected.



## VILLAGE OF DWIGHT v. HAYES.

[150 ILLINOIS, 272.]

**WATERS—POLLUTION OF—INJUNCTION.**—An injunction will lie to restrain the pollution of the waters of a stream by emptying therein the sewage of a city, thereby rendering the waters unwholesome and unfit for use, and creating a private nuisance in the premises of a landowner over which the stream flows. Although such nuisance may cause considerable damage, a court of equity will enjoin its continuance. Nor is the right to an injunction in such case affected by the fact that a large population will be thereby inconvenienced in the interruption of the use of a system of sewers.

**NUISANCE—POLLUTION OF STREAM.**—The fact that the stream into which it is proposed to empty city sewage by a system of sewers, near the complainant's farm, is not a running stream during all portions of the year, but in very dry weather contains only small pools standing in the deeper parts of its channel, serves only to aggravate the nuisance, especially when the complainant's land is situated but a little distance from the proposed point for the discharge of the sewage.

**NUISANCE—RIGHT TO RELIEF BY INJUNCTION.**—The general rule, formerly enforced with strictness, that before a court of equity would interfere to restrain a private nuisance the complainant must establish his right in a court of law, has been somewhat relaxed, and when a case is so clear as to be free from any substantial doubt as to the right to relief, and the fact that a nuisance *per se* is sought to be created is evident, the rule will not be enforced.

**EASEMENT—RIGHT TO POLLUTE WATERS OF STREAM.**—THE RIGHT OF A VILLAGE to pollute the waters of a stream by the discharge of sewage into it is in the nature of an easement, which can be created only by grant or prescription, and a mere oral consent to such pollution of the stream will vest in the village no right not in the power of the party giving the consent at any time to recall. And the fact that the village had expended money or incurred liabilities in the matter of constructing the sewers, on the faith of such parol license, will present no obstacle to such revocation.

**OFFERS OF SETTLEMENT—HOW REGARDED IN LAW.**—The law favors offers of settlement, and will not permit them afterwards to be used to the prejudice of the parties who make them. One whose rights are threatened with irreparable injury may offer to accept a specified sum of money as full compensation therefor, and such offer, when submitted and rejected, can have no tendency, as against the party making it, to show the amount or nature of his damages.

**NUISANCE—OFFER OF SETTLEMENT FOR THE INJURY.**—An offer by a landowner to permit, for a fixed sum, the discharge of sewage into a stream flowing over his land, and thereby creating a private nuisance, if rejected by the other party, cannot be resorted to for the purpose of showing that the damages to such landowner and his property, which would result from discharging the sewage of a village into the stream, might be adequately remedied by a judgment at law.

*Mayo and Widmer, George W. Patton, and R. S. McIlduff,*  
for the appellant.

*Reeves and Boys,* for the appellee.

<sup>274</sup> BAILEY, J. This was a bill in chancery, brought by John A. Hayes against the village of Dwight, to restrain the village from constructing a system of sewers, so that the same will discharge the sewage of the village into Gooseberry creek, a stream of water running through the complainant's land. The complainant owns and resides on a farm, containing about two hundred and twelve acres, situate in Grundy county, and adjoining the south line of the county. The village of Dwight is an incorporated village, having a population of about sixteen hundred, and situated in <sup>275</sup> Livingston county, and about a mile or a mile and a half south of the south line of Grundy county. Gooseberry creek has its headwaters several miles south of Dwight in two separate branches, one of which runs through the village, the two forming a junction about a half mile below on the land of David McWilliams, and running thence in a northerly direction across the complainant's land, which adjoins that of McWilliams on the north, and emptying into Mazon creek.

Gooseberry creek, as the evidence shows, is a stream in which water constantly flows, except during certain portions of the dry weather in summer, and during that time it contains pools of water at different places along its channel, sufficient in quantity and of sufficient purity to furnish drink for cattle and other domestic animals kept by the owners of the lands through which it flows. The complainant, as it appears, occupies and uses his land as a stock farm, and has been accustomed for many years to use the creek for watering his stock, and he has also been accustomed, during the winter season, to take from it his supply of ice for use during the summer.

In the summer of 1892 the village of Dwight commenced the construction of a system of sewers which were to be so constructed as to discharge the sewage of the village into Gooseberry creek, at a point on the land of McWilliams a short distance below the confluence of the two branches of the creek. The complainant thereupon filed his bill to restrain the village from discharging the sewage from its proposed system of sewers into the creek, alleging that there was a constant supply of living water in the creek, sufficiently pure and good for stock; that the complainant was using his farm as a stock farm, and relied upon the waters of the creek for the purposes of watering his stock, and that he cut ice

therefrom and stored the same at his residence for the use of his family, and that the discharge of the sewage into the creek would render the water thereof unfit for the domestic uses above referred to, and would also cause noxious odors to spread over the complainant's <sup>276</sup> farm and about his place of residence, thereby rendering the same unhealthful and uncomfortable as a place in which to live, and so would cause irreparable damage to the complainant's premises and place of residence, and would create a nuisance.

On the filing of the bill an injunction *pendente lite* was awarded as prayed for, and an answer and replication having been afterwards filed, the cause was heard on pleadings and proofs, and at such hearing a decree was entered by the circuit court, dismissing the bill at the complainant's costs for want of equity, but without prejudice to the complainant's right to prosecute an action at law. On appeal by the complainant to the appellate court the decree was reversed and the cause remanded, with directions to the circuit court to enter a decree in favor of the complainant making the injunction perpetual. From the judgment of reversal the village of Dwight now appeals to this court.

A large number of witnesses were examined, and the testimony in the record is very voluminous and to a very considerable degree conflicting. Among other things the opinions of many witnesses were taken as to what would be the probable effects upon the waters of the creek, as they flow across the complainant's land, and upon the surrounding atmosphere, of discharging the sewage of the village into the creek a short distance above his premises. While some of these witnesses seem to be of the opinion that no serious pollution of the water would result, and no nuisance be created, we concur in the opinion of the appellate court that the decided preponderance of the evidence sustains the conclusion that the water would thereby become so polluted as to render it unfit for domestic use, or for the drink of domestic animals. And this view is strongly reinforced by the inherent probabilities of the case.

Such being the case there can be no doubt, as it seems to us, as to the right of the complainant to relief in equity. As <sup>277</sup> said by Mr. High, in his Treatise on Injunctions, section 810: "Frequent ground of application for the preventive aid of equity is found in cases of the pollution of water by the flow of sewage from towns or cities into streams whose waters

are thereby injured and rendered unfit for use. In cases of this nature the preventive jurisdiction of equity is well established, the general doctrine being that the fouling or pollution of water in a stream by such sewage constitutes a nuisance and affords sufficient ground for relief by injunction. In conformity with this doctrine the owners of land upon the banks of a river below a city may enjoin the city authorities from polluting the river by sewage."

In Gould on Waters, section 546, the rule is laid down as follows: "An authority over sewage is not an authority to commit a nuisance. An owner of land upon a stream below a city is entitled to an injunction against injury by the outflow of sewage. So an injunction will lie to prevent the opening of additional sewers into a stream in such a manner as to render the water unfit for use, and it is not a defense that the city can lawfully enter upon the premises of those who use the sewer for the purpose of abating the nuisance. And if a few householders upon the stream have used it as a drain, a modern board cannot found a prescriptive right to corrupt the stream upon such usage. If any nuisance of this kind be shown, though causing inconsiderable damage, equity will enjoin its continuance. In deciding upon the right of a proprietor to an injunction against such a nuisance the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the use of the system of sewers is immaterial where the rights of an individual are invaded": See, also, Wood on Nuisances, sec. 683, et seq. See, also, *Dierks v. Commissioners of Highways*, 142 Ill. 197.

It is true the creek in question is not a running stream during all portions of the year, but during very dry weather contains only small pools or ponds of water standing in the deeper <sup>278</sup> places along its channel. But this fact manifestly would only tend to aggravate the nuisance, especially in those places situated, as is the complainant's land, but a little distance from the proposed point for the discharge of the sewage. The necessary result would be that in the hot and dry weather of summer the offensive substances discharged from the sewer would accumulate and remain at or near the point of discharge, not only defiling and polluting the pools of water standing in that portion of the channel, but emitting noxious vapors, corrupting and poisoning the atmosphere in that vicinity.

The decree of the circuit court dismissing the bill is sought to be sustained on the ground that before the complainant is entitled to an injunction he must bring his suit at law and have his right determined by a jury. While it is a general rule, and one which was formerly enforced with very considerable strictness, that before a court of equity will interfere by injunction to restrain a private nuisance, the complainant must establish his right in a court of law, that rule has in modern times been somewhat relaxed. In *Oswald v. Wolf*, 129 Ill. 200, in discussing this branch of equity jurisdiction, we said: "Even this power was formerly exercised very sparingly and only in extreme cases, at least until after the right and question of nuisance had been settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities that, to entitle a party to equitable relief before resorting to a court of law, his case must be clear, so as to be free from all substantial doubt as to his right to relief."

We are disposed to think that the complainant's case is one which, within the rule as thus laid down, entitles him to an injunction, without having first established his right at law. None of the substantial facts upon which his right rests are controverted. His title to and possession of the land across which the creek in question runs, and the intention of the village to construct its system of sewers and discharge its sewage<sup>279</sup> into the creek a few rods above his land, are admitted. It is true some witnesses are produced who express the opinion that the proposed discharge of the sewage of the village into this stream will not have the effect of materially polluting the water in the creek, but, in our judgment, little weight is to be given to the testimony of witnesses who attempt to swear contrary to known and established natural laws. That the sewage of a village of sixteen hundred inhabitants discharged into a small stream will materially pollute the water of the stream, and render it unfit for domestic use for at least a few rods below the point of discharge, is a proposition too plain and too thoroughly verified by ordinary experience and observation to admit of reasonable doubt. That such disposition by the village of its sewage will create and constitute a nuisance *per se* is a proposition too plain for serious question.

The case of *Wahle v. Reinbach*, 76 Ill. 322, was a bill in equity for an injunction to restrain a threatened nuisance,

the nuisance consisting of constructing a privy on a lot adjoining that of the complainant, within eight feet of the complainant's dwelling-house and cellar, and within twenty feet of the well from which the complainant and his family were supplied with water for drinking, cooking, and other domestic purposes. It was urged by the defendant that, before an injunction could issue in a case of that character, it was necessary that it should be previously determined by a jury in a trial at law that a nuisance in fact existed. This contention was overruled, the court citing in support of its judgment, among various other authorities, the following passage from Kerr on Injunctions: "The court will not, in general, interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance." It was accordingly held that a privy so constructed and located as to corrupt the <sup>286</sup> water of a well used for domestic purposes, or so near the complainant's dwelling-house as to annoy him in the proper enjoyment of his property, constituted a nuisance *per se*, and that no preliminary declaration of that fact by a jury was necessary to give a court of equity jurisdiction.

We are satisfied that the same rule should be applied here. The discharge of the sewage of the village into the creek, thereby corrupting the waters of the stream as it flows across the complainant's land, would create a nuisance *per se*, and the complainant was therefore clearly entitled to an injunction restraining the creation of such threatened nuisance.

But it is contended that the complainant gave his consent to the construction of the proposed system of sewers, and to the discharge of the sewage of the village into the creek, and that he thereby estopped himself from any right to the relief now prayed for. The evidence shows that when the construction of the proposed system of sewers was in contemplation, a public meeting of the citizens of the village of Dwight was called by the municipal authorities, to consider the advisability of constructing the proposed sewers, and that the complainant was one of those who attended the meeting. It also appears that during the meeting his views were called for, and that he thereupon made a few remarks, in which, as is claimed, he expressed his approbation of the enterprise, and

his willingness that the sewers should be so constructed as to discharge the sewage into the creek. He testifies, on the other hand, that he at the time supposed that the sewer under consideration was merely a sewer to convey off the sewage from the buildings of the Keeley Institute, and not a general system of sewers for the entire village, and that whatever he may have said had reference solely to that one sewer, and that he did not intend to be understood as consenting to a discharge into the creek of all the sewage of the village, and there are some circumstances corroborative of the complainant's account of the matter.

<sup>281</sup> How far, if at all, the subsequent action of the village authorities was taken in reliance upon what was said by the complainant at this meeting does not appear, but the evidence shows that they subsequently caused plans and specifications of the proposed system of sewers to be prepared at considerable expense, adopted the necessary ordinance providing for its construction, and entered into a contract with certain parties to construct the sewers at a stipulated price. It also appears that the contractors, after the execution of the contract, commenced its performance by placing on the ground considerable quantities of brick and tile for the sewers. After this was done the authorities of the village applied to the complainant for a deed granting to them the right to discharge the sewage into the creek, but that the complainant refused to give, and it is conceded that he then or thereafter revoked any oral license which he may have given to the village to discharge its sewage in that manner.

The most that can be said of the complainant's consent to the proposed system of sewers, if he in fact gave such consent, is that it was a mere oral license which was revocable at any time by the licensor. The right to pollute the waters of the creek by discharging the sewage into it was in the nature of an easement, which could be created only by grant or prescription, and a mere oral consent to such pollution of the stream vested in the village no right which it was not in the power of the complainant at any time to recall. Nor did the fact that the village had expended money or incurred liabilities in the matter of constructing the sewers present any obstacle to such revocation: *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; 54 Am. Rep. 243; *Woodward v. Seely*, 11 Ill. 157; 50 Am. Dec. 445; *Tiedeman on Real Property*, sec. 653, and cases cited in note.



So far as the village expended money or incurred liabilities in the matter of constructing the proposed sewers it must be held to have done so with full knowledge of the fact that the complainant had in no way obligated himself to allow the <sup>282</sup> sewage to be discharged into the creek, by any binding act or instrument, and that he was at liberty at any time to recall the consent which he had orally given. And if, under these circumstances, and without seeking to obtain from him any grant of the right of way over his land, or the execution by him of any other binding obligation in the premises, the village authorities saw fit to take steps towards the construction of the sewers, they are hardly in a position to invoke the doctrine of estoppel for the purpose of precluding the complainant from the assertion of his legal or equitable rights in the premises.

It is finally insisted that the complainant has a complete and adequate remedy at law, and that relief in equity should be denied for that reason. We do not understand counsel as denying that, ordinarily, in cases of private nuisances of this character, the threatened damage is, in a legal sense, irreparable, so as to call for the interposition of equity, but it is claimed that because the complainant, at the request of the village authorities, submitted a proposition or offer to permit the discharge of sewage into the creek upon certain specified terms, he thereby conclusively admitted that his damages were capable of admeasurement in money, and therefore capable of being completely compensated at law. The proposition submitted was as follows:

“DWIGHT, ILL., 7/28, 1892.

“*R. A. Buck,*

“DEAR SIR: About the sewer will say: That I will require the creek made straight by the Grosh House, and cleaned up through the willows below the same, and the creek fenced on both sides, three-board and two-wire fence; two bridges made across the creek; said fence and bridges to be kept in repair by the city without expense to me, and for being deprived of the use of said creek for stock-watering, ice-cutting, etc., consideration will be five thousand dollars (\$5,000). This leaves the stench question open. J. A. HAYES.”

<sup>283</sup> This, on being submitted to the village board, was promptly rejected. We are unable to see that any such force or effect can be given to this proposition as is contended for. A party whose personal or property rights are threatened

with irreparable injury, may, if he sees fit, offer to accept a specified sum of money as a full compensation for the threatened injury, but such offer, when submitted and rejected, can have no tendency, as against the party making it, to show the amount or nature of his damages. In cases of this character, as in others, the law favors offers of settlement, and will not permit them afterwards to be used to the prejudice of the parties who make them. So, here, the offer of settlement cannot be resorted to for the purpose of showing that the damages to the plaintiff and his property which would result from discharging the sewage of the village into the creek might be adequately remedied by a judgment at law.

We concur with the appellate court in its conclusions, and its judgment will be affirmed.

**INJUNCTION TO RESTRAIN POLLUTION OF WATERS.**—To prevent the pollution of water an injunction will issue at the instance of the party injured: *Chapman v. City of Rochester*, 110 N. Y. 273; 6 Am. St. Rep. 366, and note; *Barton v. Union Cattle Co.*, 28 Neb. 350; 26 Am. St. Rep. 340, and note. See, also, the note to *Crichton v. Dahmer*, 35 Am. St. Rep. 673.

**NUISANCE.—POLLUTION OF WATERS:** See the note of *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551.

**INJUNCTION.—RESTRAINING NUISANCE BY PRIVATE ACTION:** See the note to *Jackson v. Kiel*, 16 Am. St. Rep. 209.

**SETTLEMENTS.**—A fair settlement of conflicting claims between parties is binding upon them, though they may have yielded legal rights, and the law should favor and encourage such settlements: *Converse v. Blumrich*, 14 Mich. 109; 90 Am. Dec. 230.

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## LESTER v. PEOPLE.

[150 ILLINOIS, 408.]

**PRACTICE—ERRONEOUS ORDER OF COURT—APPEAL.**—Mere errors in making interlocutory orders will, in general, furnish no justification for disobedience thereto if they do not subject the party to the payment of money or imprisonment. If the party against whom such order is made wishes to contest its validity or propriety he may refuse to obey, and in the further proceedings for contempt may show in defense that the court had no authority to make the order, and if his defense is disallowed and judgment is entered against him for a sum of money by way of fine, enforceable by execution or imprisonment, an appeal in his favor will lie.

**PRACTICE—OYER OF INSTRUMENT.**—At common law, in suits upon sealed instruments, of which it was necessary to make profert, the defendant might demand oyer, and thereby have an inspection of the instrument sued upon. And, by the Illinois statute relating to practice, this rule is extended to all instruments declared on, whether under seal or not.

The common law also furnished another mode, not confined to instruments under seal, which was by application, pending the action, to the equitable jurisdiction of the court for an order to inspect, but such order was obtainable only in a very limited number of cases.

**PRACTION.—OVER OR INSPECTION IS CONFINED** to instruments in writing declared upon, and constituting the cause of action, or set up in a plea by way of defense, and does not apply when the deed is stated as mere inducement.

**CONSTITUTIONAL LAW.—PRODUCTION OF PARTY'S BOOKS AND PAPERS ON TRIAL.**—An order for the production of a party's books on the trial, to be used as evidence, in proper cases and upon proper showing, is not an unreasonable seizure of them. But an order by which his books are taken from his custody and committed to that of a third person, for an indefinite period of time, for an inspection, generally, into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, is unwarranted by the law, amounts to an unlawful deprivation of his property rights, and is in palpable violation of his constitutional right to be secure against unreasonable seizure of his papers and effects.

**STATUTORY CONSTRUCTION.—PRODUCTION OF BOOKS AND PAPERS.**—Under the Illinois statute relating to the production of books and papers (Ill. Rev. Stats., c. 51, sec. 9), the court may compel the production of the books of a party, to be used in evidence on the trial by his adversary, upon proper showing that they contain entries tending to prove the issues. But the statute cannot be construed as giving the court power to take the books and papers of the party and impound them with an officer of the court for inspection or examination out of the presence of the court. It does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions.

**CONTEMPT.—RIGHT TO QUESTION PROPRIETY OF UNAUTHORIZED ORDER.**—The court exceeds its power in requiring the defendant to place his books of account in the hands of the clerk, there to remain indefinitely, with leave to the plaintiff to make copies of the entries therein, solely for the purpose of enabling him to prepare his case, and the defendant may disobey such order, and will not be liable to attachment as for a contempt.

**CONTEMPT.—WHEN A CRIMINAL PROCEEDING.**—When the contempt consists of something done or omitted, in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some act injurious to a party protected by the order of the court, which has been forbidden by its order, the proceeding is punitive, and by way of punishment for the wrongful act, and to vindicate the authority and dignity of the people, as represented in and by their judicial proceedings.

**CONTEMPT.—CONDUCT OF PROCEEDING.**—When the proceeding is for criminal contempt the more appropriate and general practice is to prosecute in the name of the people; but where the proceeding is really but an incident of the principal suit the practice seems to be to entitle and file the papers in the original cause.

**CONTEMPT—CIVIL PROCEEDING—APPEAL.**—Where a party to a civil suit, having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and, upon refusal, the court, by way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit, it is a civil proceeding, and an appeal lies from the final order as in other civil causes.

**ORDER TO PRODUCE BOOKS—DISOBEDIENCE TO ORDER—APPEAL.**—A proceeding to punish a party to a civil action for disobeying an order of the court to produce his books of account for the inspection of the adverse party, and to enable him to prepare his case for trial, is civil, and not criminal. Such order of the court, before any proceedings are taken in execution thereof, is not a final judgment, reviewable upon appeal or writ of error; but if the court has attempted to enforce obedience to its order by the imposition of a fine, or by a definite term of imprisonment, as for a contempt, the judgment of the court imposing such fine or imprisonment will be final, and an appeal will lie therefrom.

**APPEAL—JURISDICTION OF SUPREME COURT.**—In an order or proceeding involving the construction of a constitutional provision the supreme court has jurisdiction on direct appeal from the trial court.

**APPEAL—OVERRULING MOTION TO DISMISS.**—Judgment of reversal by the supreme court is, in effect, an overruling of a motion to dismiss.

**REHEARING—EFFECT OF FILING PETITION FOR.**—The filing of a petition for a rehearing can, under the rules of the supreme court, have no greater effect than to stay the execution of the judgment pending the petition. An order overruling the petition will leave the judgment in full force as of the date of its rendition.

**APPEAL** from an order of the circuit court in the suit of *Berkowitz v. Lester et al.*, imposing a fine upon John T. Lester for contempt, in refusing to comply with an order of that court to produce certain books for inspection of the plaintiff and his attorney. Lester brought this appeal, and among the assignments of error are the following: That said order was unconstitutional and void; that the court had no power to make and enter said order at common law or under the statutes of Illinois; that the court had no power to enforce said order by contempt proceedings, and it was erroneous to so attempt to enforce the same.

*John S. Cook and John N. Jewett*, for the appellant.

*Thomas J. Sutherland*, for the appellees.

<sup>415</sup> **SHOPE, C. J.** In the original suit of *Berkowitz v. Lester et al.*, out of which this controversy arises, the circuit court made an order upon the defendants to place the books in which the business transactions of the defendants with the plaintiff and other persons were entered, and showing all transactions in which the defendants, as a firm and as

individuals, were in any way interested, in the possession of the clerk of the court, that they might be inspected by the plaintiff and his attorney, with leave to examine and take copies, in order that they might, as it was <sup>416</sup> claimed, prepare for the trial of said cause. Before any proceedings were taken in execution of that order the defendants brought the case to this court by writ of error, for the purpose of having that order of the circuit court reversed. We then dismissed the writ of error, upon the sole ground that the order was not a final judgment, reviewable upon appeal or error. In delivering its opinion in that case this court said: "It was the privilege of the defendants either to obey the order or to stand in defiance of the power of the court. Had the court attempted to enforce obedience to its order by the imposition of a fine, with an order for execution, or by a definite term of imprisonment, as for a contempt of court, the judgment of the court imposing such fine or imprisonment would be final, and from which an appeal might be taken or to which a writ of error would lie. That would conform exactly with the rule stated by the court in *Blake v. Blake*, 80 Ill. 523. On the reviewing of such a judgment of the court that might deprive defendants either of their property or of their liberty, the propriety of the preliminary or interlocutory order could be considered, otherwise not": *Lester v. Berkowitz*, 125 Ill. 307. After this decision the circuit court attached the defendant for contempt, for refusing to obey said order, and imposed a fine of two hundred dollars upon the defendant, Lester, and ordered that he stand committed until the fine and costs of the proceeding were paid, thus bringing the case within the rule there announced, and making the case one in which an appeal will lie.

As a general rule mere errors in making interlocutory orders will furnish no justification for refusing to obey the same, where they do not subject the party to the payment of money or imprisonment. If the party against whom such order is made wishes to contest the validity or propriety of the order he may refuse to obey, and in the further proceeding for contempt he may show in defense that the court had no authority to make the order, and if his defense is disallowed, and judgment <sup>417</sup> is entered against him for a sum of money by way of fine, enforceable by execution or imprisonment, an appeal in his favor will lie.

At common law, in suits upon sealed instruments, of which

it was necessary to make profert, the defendant might demand oyer, and thereby have an inspection of the instrument sued upon. This was limited to contracts or other instruments under seal, and technically known as deeds. By section 20, chapter 110, of our statute relating to practice, this rule is extended to all instruments declared on, whether under seal or not. It reads: "It shall not be necessary, in any pleading, to make profert of the instrument alleged, but in any action or defense upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may have oyer thereof, and proceed thereon in the same manner as if profert had been properly made according to the common law." And it was held, under this statute, that the court might compel the production of the original instrument sued on: *Mason v. Buckmaster*, Beecher's Breese, 27.

Oyer or inspection is confined to instruments in writing declared upon and constituting the cause of action, or set up in a plea by way of defense. It does not apply when the deed is stated as mere inducement. The common law also furnished another mode, which was not confined to instruments under seal. This was by application, pending the action, to the equitable jurisdiction of the court for an order to inspect: *Pollock on Documents*, 1. The order for inspection was obtainable "only in a very limited number of cases, as where one party could be considered as holding a document as agent or trustee of the party seeking inspection, or where the applicant was a party to a written contract, of which but one part is executed, or where one part has been lost or destroyed, and it was also, in general, considered necessary that the party applying should be a party to the instrument which he sought to inspect; and although a trial was sometimes postponed for <sup>418</sup> the purpose of enabling a party to take proceedings in equity, yet, whenever an application to the court of law was in the nature of a bill for discovery, they invariably refused to grant inspection: *Pollock on Documents*, 3.

It is claimed, however, that the order for the production and inspection of the defendants' books is authorized by the statute relating to evidence (c. 51, sec. 9), which provides that "the several courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to

the issue." The evident purpose and design of this statute was to furnish to a party litigant a speedy and summary mode by which, under the order of the court, to obtain written evidence pertinent to the issue which might be in the possession and control of his adversary, and thus obviate the necessity of a bill of discovery seeking the same end. It is manifest that it contemplates the production of evidence on the trial of the cause which the party applying therefor is entitled to introduce in support of his case, and which the other party withholds. It is only such books or writings as contain evidence pertinent to the issue that are required to be produced, and it is for the purpose of enabling the party demanding their production to introduce such pertinent matter in evidence on the trial. A defendant is not required to disclose matters of evidence relied upon in the defense, and thus inform the plaintiff of his case farther than the pleadings show. Matters purely of defense are the property rights of the defendant, which he may disclose or not upon the trial: 2 Phillips on Evidence, 330; *Lawrence v. Ocean Ins. Co.*, 11 Johns. 245; *Strong v. Strong*, 1 Abb. Pr. 233. This is undoubtedly the rule, and unless a showing is made, upon good and sufficient cause, that the evidence sought, or that the books and papers required to be produced, contain evidence <sup>419</sup> pertinent to the issue on behalf of the party applying therefor, the application should be denied.

The plaintiff in his motion, and affidavits in support thereof, failed entirely to show that the books of the defendants which he asked to inspect were required for any purpose of evidence in the case. Indeed, it is apparent that the application was not for the production of such books to be used on the trial of the cause, but for the inspection of plaintiff and his counsel out of court, and for the purpose of preparing the case of the plaintiff for trial. It was shown on the hearing by the affidavits filed by defendants, that full and complete statements of all the plaintiff's dealings with the defendant firm, or through them, had been furnished, together with a full transcript of his account, and which were attached to the affidavit of the defendant Peters, filed on the hearing of the contempt case. The object and purpose of the applications were to enable the plaintiff and his attorney to inspect not only the accounts of the plaintiff with the defendants, and all entries made on their books in respect of the dealings between them, but also the inspection of daily purchases and



sales of stocks by the defendants during the time of the transactions between plaintiff and defendants, irrespective of to or for whom, or for whose account such sales or purchases were made, and the entry of all stocks carried by the defendants for themselves or others, from day to day, and on each day during the same period. It was sought, and such was the order of the court, that the books of the defendants should be impounded with the clerk of the court indefinitely, for the purposes of such examination and inspection by counsel. Under the statute quoted the court has power to compel the production of the books of a party to be used in evidence on the trial by his adversary, upon proper showing that they contain entries tending to prove the issues; but the statute cannot be construed as giving the court power and authority to take the books and papers of the party and impound them with an <sup>420</sup> officer of the court for inspection or examination out of the presence of the court. The books sought to be inspected in this case were the property of the defendants, and contained many entries, as it is shown, of business transactions of the defendants with many other persons, and to large amounts, in which the plaintiff had no interest whatever. The right to compel the production of books as evidence is clear. The right to compel their submission to a general examination and inspection out of the presence of the court, even though in the possession of one of its officers, is entirely a different matter. It will not be understood that the rule for the production of books before a master in chancery, in proper cases, is here sought to be stated. It is only such entries as in some way tend to prove a matter material to the issue that are competent to be considered upon compliance with the order to produce the same. It might be that these books of the defendants might contain entries tending to show illegal transactions upon the stock exchange, or upon the board of trade, of which the entries in such books might become competent evidence against the defendants in penal prosecutions; but such fact, if it existed, or was shown by affidavit to exist, would furnish no ground or justification for the order made. The statute does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions: *Updyke v. Marble*, 44 Barb. 69; *Mott v. Consumers' Ice Co.*, 52 How. Pr. 148; *Cutler*

v. *Poole*, 54 How. Pr. 311; *Whitman v. Weller*, 39 Ind. 515; 2 Best on Evidence, sec. 625.

The statute under consideration ought, if possible, to receive such a construction as will not render it in conflict with the constitution of the state or of the United States. The constitution of this state provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. <sup>421</sup> Cooley, in a note to his work on Constitutional Limitations, page 307, after referring to a few cases in which the court has ordered a production of private telegrams, says: "We should suppose, were it not for the opinions to the contrary by tribunals so eminent, that the party could not be entitled to a man's private correspondence, whether he obtained it by seizing it in the mail, or by compelling the operator of the telegraph to testify to it, or by requiring the servant to take from his desk his private letters and journals, and bring them into court on *subpœna duces tecum*. Any such compulsory process to obtain it seems a most arbitrary and unjustifiable seizure of private papers—such an unreasonable seizure as is directly condemned by the constitution." See, also, *Kilbourn v. Thompson*, 103 U. S. 168; *Boyd v. United States*, 116 U. S. 616.

Under the constitution the defendants' private books and papers were protected against unreasonable searches and seizures, and we think that this constitutional right was violated and disregarded by the order of the court. While an order for the production of a party's books on the trial, to be used as evidence, in proper cases and upon proper showing, is not an unreasonable seizure of them, an order by which his books are taken from his custody and committed to that of a third person, for an indefinite period of time, for an inspection, generally, into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, in our opinion is unwarranted by the law, amounts to an unlawful deprivation of his property rights, and is in palpable violation of his constitutional right to be secure against unreasonable seizure of his papers and effects. The statute under consideration was not intended to justify such taking and holding of the private books of a litigant. As before said, its purpose is met when the party is required to produce, in open court, all books and papers in his possession or power which contain evidence pertinent to the issue, and reasonable opportunity

422 is given for examination thereof in the presence and under the direction of the court.

We are of opinion that the court exceeded its power in requiring the defendants to place their books of account in the hands of the clerk, there to remain indefinitely, with leave to the plaintiff and his attorney to make copies of the entries therein, not for the purpose of being then used in evidence under the direction of the court, but for the purpose of enabling the plaintiff to prepare his case, with the advantage of being advised beforehand of the defendant's defense to his action. The defendant had the right to question the propriety of such order, and, as we have seen, to do so he must refuse to obey. The order being unauthorized, he had a right to disregard it, and there was, therefore, error in the imposition of a fine for his disobedience of such order.

For the reasons given, the order of July 12, 1887, and the judgment of the court in the attachment proceeding, are reversed.

In response to a petition for a rehearing, the following additional opinion was filed:

Per CURIAM. In the petition for rehearing the point is made, among others, that the court failed to determine the motion made in this court, to dismiss the appeal. The effect of the judgment of reversal was, as a matter of course, an overruling of the motion, but it is probable that sufficient attention to the point was not given in the opinion.

The first ground upon which the motion was predicated is, that the proceeding is a criminal case, and therefore, if reviewable at all, it can be done only on writ of error. It is insisted that the holding in respect of this question, in the principal case of *Lester v. Berkowitz*, 125 Ill. 307, cited and relied upon in the opinion in this case, was *dictum* merely. We are of the opinion that this proceeding, although criminal 423 in form, is purely a civil remedy, intended to enforce the private right of the party litigant. There is, as held in *Howard v. Durand*, 36 Ga. 358, 91 Am. Dec. 767, a clear distinction, both upon principle and by the authorities, between that class of cases where it is sought to vindicate the authority or dignity of the court, and those where the proceeding is remedial, and intended to compel the doing or omission of an act necessary to the administration of justice in enforcing some private right. In *People v. Compton*, 1 Duer, 512, it is said that "a solid and obvious distinction" exists between con-

tempt cases strictly and those acts denominated contempts which are punished as such only for the purpose of enforcing a civil remedy. In *Crook v. People*, 16 Ill. 534, we said: "Proceedings as for contempt are recognized as a right of the party in interest, and distinguishable from merely criminal contempts." The authorities sustaining and recognizing this distinction are numerous, from among which may be cited, in addition to those already noted: *Phillips v. Welch*, 11 Nev. 187; *Tome's Appeal*, 50 Pa. St. 285; *Cobb v. Black*, 34 Ga. 162; *Hawley v. Bennett*, 4 Paige, 163; *Androscoggin etc. R. R. Co. v. Androscoggin R. R. Co.*, 49 Me. 392; *Ruhl v. Ruhl*, 24 W. Va. 279; *Ex parte Bollig*, 31 Ill. 96; *Buck v. Buck*, 60 Ill. 105; *Robbins v. Gorham*, 25 N. Y. 588. The late case of *People v. Diedrich*, 141 Ill. 669, is practically conclusive of every question arising upon this branch of the case.

When the contempt consists of something done or omitted in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some act injurious to a party protected by the order of the court, which has been forbidden by its order, the proceeding is punitive, and is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the people, as represented in and by their judicial tribunals. In such cases, although the application for attachment, when necessary to <sup>424</sup> be made, may be made and filed in the original cause, the contempt proceeding will be a distinct case, criminal in its nature, and may properly be docketed and carried on as such, and the judgment entered therein will exhaust the power of the court to further punish for the same act and offense: *Ex parte Kearney*, 7 Wheat. 42; *Cartwright's case*, 114 Mass. 238; *New Orleans v. Steamship Co.*, 20 Wall. 392; *Ingraham v. People*, 94 Ill. 428, and cases *supra*.

Cases of that character are clearly distinguished from cases where a party to a civil suit, having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and, upon refusal, the court, by way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant, and not in the

public interest or to vindicate any public right, and the proceeding is regarded as coercive, merely. In *People v. Court of Oyer and Terminer*, 101 N. Y. 247, 54 Am. Rep. 691, the court of appeals of that state, referring to this class of coercive orders, say: "And if imprisonment is ordered it is awarded, not as punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled, which are essential to his particular rights of person or property. . . . If, in this class of cases, there exist traces of vindication of public authority they are faint, and are utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperiled, or indemnity for such rights defeated." In *Phillips v. Welch*, 11 Nev. 187, the court, after saying that "if the contempt consists of the refusal of the party to do something he is ordered to do for the benefit or advantage of the other party, the process is civil," then adds, <sup>425</sup> that this distinction is consistent with all the decisions, and in no other way can they be rendered consistent with each other.

It is wholly unimportant whether the original order be for the payment of money, for the delivery of deeds or writings, the production of books, or the doing or omitting to do any other act or thing for the benefit of the adverse party to the civil litigation. The order of which he is alleged to be in contempt was entered solely to advance the private right in the civil proceeding, and any penalty inflicted is by way of execution of that order: 3 Am. & Eng. Ency. of Law, 396, and cases in note. Nor is the mode of punishment adopted by the court at all important. If punishment is imposed for a criminal contempt the power of the court to further punish for the same act and offense is exhausted. In the class of cases where the penalty inflicted is intended to be coercive the party in contempt can only be relieved by compliance with the order. If the defendant had been committed until he complied with the former order, the imprisonment would cease upon such compliance. The imposition of a fine was no less coercive. The appellant could not, by payment of the fine, absolve himself from contempt. The purpose being to compel obedience to its former order, the court would impose other penalties until there was full compliance. If, from the proceeding for criminal contempt, a private party is benefited or his remedy advanced it will be simply because the conviction operates *in terrorem* upon the wrongdoer, in

like manner as would the enforcement of a criminal statute or penal provision; in the other, the purpose is the advancement of the private right of the party in his civil suit. In one class the object of the proceeding is, by punishment of the wrongdoer, to vindicate and preserve the dignity of and respect for the public authority; in the other, to afford relief *inter partes*. Both upon principle and authority this proceeding was therefore a civil proceeding, and an appeal therefore lies from the <sup>420</sup> final order as in other civil causes: *Blake v. Blake*, 80 Ill. 523; *Tolman v. Jones*, 114 Ill. 147; *Walton v. Develing*, 61 Ill. 206; *People v. Diedrich*, 141 Ill. 669, and cases cited.

It is insisted, also, that the appeal should have been dismissed, for the reason that this court was without jurisdiction, and that if appeal was allowable it should have been taken to the appellate court. A construction of the constitutional provision providing for security against unreasonable searches and seizures of papers and effects of the citizen is fairly raised and pressed in argument. We are of opinion that a construction of the provision of the constitution is so far involved as to give this court, under the statute, jurisdiction on direct appeal. The motion to dismiss the appeal was properly overruled.

It is also insisted in the petition for rehearing that the original order and the record in the original cause showing the steps taken precedent to the entry of the order holding the appellant to be in contempt and imposing the penalty, is not properly before us, and a motion was made in this court originally to strike out the transcript of the record and bill of exceptions therein. The holding in respect of whether the contempt proceeding should be entitled and prosecuted as an independent proceeding in the name of the people, or carried on as a part of the civil proceeding to which it is incident, is not uniform. The question has ordinarily been treated, as it necessarily is, of comparatively little importance. When the proceeding is for criminal contempt it would be more appropriate to prosecute in the name of the people, and such is the general practice: *Cartwright's case*, 114 Mass. 238. Where the contempt proceeding is really but an incident of the principal suit the practice seems to have been to entitle and file the papers in the original cause: *Buck v. Buck*, 60 Ill. 105; *Blake v. Blake*, 80 Ill. 523; *Wightman v. Wightman*, 45 Ill. 167; *Hill v. Crandall*, 52 Ill. 70. *Dickey v. Reed*, 78 Ill. 261; *Tolman v.*

427 *Jones*, 114 Ill. 147; *Rapalje on Contempts*, sec. 95. But in no event could the mere entitling of the cause change the nature or character of the proceedings, and render that criminal which was otherwise a civil proceeding; and in all this class of cases so much of the record in the original cause as may be necessary to show the order upon which the alleged contempt is based, and the proceedings had in respect thereof, will, if properly incorporated into the record, as is here done, be brought up by appeal from the order in the contempt proceeding, and may be considered on such appeal. The motion was in effect overruled, and, we think, properly so.

Suggestion is made of the death of appellant Lester since the rendition of judgment of reversal in this court, and pending the petition for rehearing. The filing the petition for rehearing can, under the rules of court, have no greater effect than to stay the execution of the judgment pending the petition. It has no effect upon the judgment, and, therefore, if rehearing is to be denied, as it must be in this case, no necessity exists for reviving the suit in the name of the personal representative of appellant if it is otherwise proper to do so. The order overruling the petition for rehearing would leave the judgment in full force as of the date of its rendition, if rendered in vacation, and as of the last day of the term, if rendered in term time.

We are of opinion that the petition for rehearing should be denied, and this cause having been taken under advisement at the last term of the court, in the northern grand division of the state, where the same is pending, it is now ordered, in vacation, that rehearing be denied.

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CONTEMPT—WHEN A CRIMINAL PROCEEDING.—A criminal contempt is an act in disrespect of the court or of its process which obstructs the administration of justice or tends to bring the court in disrepute: *Ex parte Robertson*, 27 Tex. App. 628; 11 Am. St. Rep. 207, and note.

CONTEMPT—PRACTICE.—Contempt, though a specific criminal offense, is prosecuted as a matter of practice in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own: *Ex parte Ah Men*, 77 Cal. 198; 11 Am. St. Rep. 263.

SUPREME COURT—JURISDICTION OF.—Whenever a constitutional question is necessary to be determined in the adjudication of a case the supreme court has jurisdiction to review the proceedings upon appeal or writ of error: *Phillips v. Denver*, 19 Col. 179; *ante*, 230, and note.

APPEAL—REHEARING—EFFECT OF.—Granting a rehearing in equity does not *per se* vacate the decree, but simply opens it for reversal, alteration, or correction: *Lockwood v. Bates*, 1 Del. Ch. 435; 12 Am. Dec. 121. The fil-



ing of a motion for leave to present a petition for rehearing, or even the granting of such leave, does not have the effect to vacate, annul, or suspend a judgment of the supreme court: *Ashley v. Hyde*, 6 Ark. 92; 42 Am. Dec. 685.

**Power to Compel Party to Produce Books and Papers as Evidence or for the Examination of His Adversary.**

*Of the Power in General.*—By the ancient rule of the common law no man was bound to furnish his adversary with evidence to be used against himself: See *Anonymous*, 3 Salk. 363. And parties not being competent witnesses at common law, notice to produce was the only remedy of a party in a suit at law, unless he resorted to equity, in case the other party to the record had in his possession books or papers containing evidence material to the trial, and such notice never enabled the party to compel the production of such books or papers. All the effect it had was to lay the foundation for the introduction of parol or secondary proof of their contents, in case it appeared that the books and papers described in the notice were in the possession of the party notified, and that he refused to produce them at the trial as requested: *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, 203; *Smith v. Rentz*, 131 N. Y. 169, 175; and see *Austin v. Thomson*, 45 N. H. 113. Even orders for the inspection of documents could not be made by a court of common law, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party: *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 254. In later times, however, the strictness of the old rule was considerably relaxed, and it became the established English practice for the court to order a party to furnish papers to his adversary, or allow copies of them to be taken, if material to his suit or defense: *Black v. Gompertz*, 7 Ex. 67; *Rend v. Coleman*, 2 Dowl. P. C. 354; 2 Car. & M. 456; *Doe dem v. Slight*, 1 Dowl. P. C. 163; *Price v. Harrison*, 8 Com. B., N. S., 617; *Steadman v. Arden*, 15 Mees. & W. 587. But the New York court, in the earlier decisions, declined to follow the English practice, except in certain cases, as where the instrument to be inspected or copied was the immediate foundation of the action, and in a few other cases depending upon peculiar circumstances. It was held that the exercise of the power of courts at common law to compel the production of writings in actions therein was confined to those which were the foundation of the action, excluding those which were evidentiary only: *Willis v. Bailey*, 19 Johns. 268; *Bank of Utica v. Hillard*, 6 Cow. 62. The broader ground was taken, however, in decisions of the same court, that either party was entitled to a rule for the production of a paper, when on a bill of discovery he could obtain what he asked for, and the paper was necessary to enable him to proceed in his cause with safety: *Lawrence v. Ocean Ins. Co.*, 11 Johns. 245, note; *Wallis v. Murray*, 4 Cow. 399; *Townsend v. Lawrence*, 9 Wend. 458. See *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 54; 26 Am. St. Rep. 507. And it is a matter of course in courts of law to compel a party who has the possession of a document belonging equally to both, to produce the same for the inspection of his adversary, for the purposes of the suit: *Kelly v. Beckford*, 5 Paige, 548. A plaintiff who, in whatever manner or under whatever name, is entitled to a portion of the proceeds of a common venture, is *prima facie* entitled to an inspection, when necessary, of the books containing the records thereof, unless it appears that the application is in bad faith: *Vieller v. Oppenheim*, 31 Abb. N. C. 181.

A court of equity has the power to compel the discovery and production of papers in virtue of its inherent and general jurisdiction. And, according to the principles and practice of such courts, a bill called a bill of discovery may be filed for the discovery of facts in the knowledge of an adverse party, or of deeds or writings, or other things in his custody and power, and is usually employed to enable the complainant to prosecute or defend an action: *Townsend v. Lawrence*, 9 Wend. 458, 460. And if deeds, letters, or other writings are referred to in an answer the same will, on the plaintiff's motion, be ordered to be left with an officer of the court for the inspection of the complainant or his counsel: *Townsend v. Lawrence*, 9 Wend. 458, 460 *Atkins v. Wright*, 14 Ves. 211, 214; *Bischoffsheim v. Brown*, 29 Fed. Rep. 341, 342. Where the books or papers of the plaintiff are required by the defendant for the purposes of his defense in the suit he ought to file a cross-bill against the plaintiff for a discovery of them: *Kelly v. Eckford*, 5 Paige, 548; *Millsaps v. Pfeiffer*, 44 Miss. 805.

The production and inspection of documents in the hands of the adverse party, both in suits at law and in equity, are now obtained and regulated by statute, not only in England, but very generally in this country. And it was not until the enactment of such statutes, conferring upon common-law courts the same power to compel the discovery and inspection of books and papers, which was exercised by courts of chancery, that courts of common law claimed or exercised full power over the subject: See *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50, 54; 26 Am. St. Rep. 507. The matter is regulated in English practice by Statutes 14 and 15 Victoria, chapter 99, section 6, and 17 and 18 Victoria, chapter 125, sections 50, 58; which confer upon the superior courts of common law in Great Britain and Ireland the equitable power to compel the production and inspection of documents relating to the subject in dispute. But it has been said of these statutes that they are to be considered rather as declaratory, than creative, of the jurisdiction of the courts of common law in this respect: *Ely v. Mowry*, 12 R. I. 570, 571; and see *Hilyard v. Township*, 37 N. J. L. 170. Under the English statutes the right to discovery is regulated by the rules previously existing in the court of chancery: *Anderson v. Bank of British Columbia*, 2 Ch. Div. 644; the old practice furnishes a guide by analogy to the present practice: *Cashin v. Craddock*, 2 Ch. Div. 140, 147. So, it is observed, generally, that the application under statutes providing for the production of writings is clearly intended as a substitute for the more ancient and cumbersome method of a bill of discovery, and that whenever the application shows a case which would entitle the party to relief under such a bill he may have such relief under the statute: See *Arnold v. Pawtuxet etc. Water Co.*, 18 R. I. *Townsend v. Lawrence*, 9 Wend. 458; *Gould v. McCarty*, 11 N. Y. 575; *Faircloth v. Jordan*, 15 Ga. 511. And it is held in Massachusetts that the statutory provisions whereby parties are made competent witnesses, and are permitted in suits at law or in equity to obtain from each other the discovery of facts and documents by filing interrogatories, have not taken away the jurisdiction of the court to entertain bills of discovery: *Post v. Toledo etc. R. R. Co.*, 144 Mass 341. 59 Am. Rep. 86; and see *Handley v. Heflin*, 84 Ala. 600; *Olivieru v. University*, Phill. Eq. 69; *Bryant v. Leyland*, 6 Fed. Rep. 125, 126.

In the trial of actions at law in the courts of the United States the proceeding for the production of books or papers in the possession of the parties is regulated by the Revised Statutes: U. S. Rev. Stats., sec. 724. The provision authorizing the proceeding was framed in order to confer power which did not previously exist at common law in compelling the production

of documents by parties upon motion, and it has no application to suits in equity. The established practice in equity is deemed adequate on that side of the court: *Bischoffsheim v. Brown*, 24 Blatchf. 173; 29 Fed. Rep. 341; *United States v. Babcock*, 3 Dill. 566. As to the proper practice under the statute, see *Lowenstein v. Carey*, 12 Fed. Rep. 811, 812; *Gregory v. Chicago etc. R. R. Co.*, 10 Fed. Rep. 529; *Jacques v. Collins*, 2 Blatchf. 23. Briefly stated, the motion for a rule to produce must be in a case at law, and on due notice to the opposite party, and it must appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issue, and that the case and circumstances are such that the party might be compelled to produce the same, as therein provided: *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, 203. The power given by the statute to the federal courts to order the production of books and papers is held to include power to grant an inspection before trial, with permission to make copies: *Exchange Nat. Bank v. Washita Cattle Co.*, 61 Fed. Rep. 190; *Bank v. Tayloe*, 2 Cranch C. C. 427. It is to be observed that parties to suits in equity, as well as in suits at law, are now competent witnesses in the courts of the United States by statute, and may now be examined at the instance of their adversary. And, as a witness, a party can be compelled by a *subpoena duces tecum* to produce books, documents, and papers in his possession the same as any other witness: *Bischoffsheim v. Brown*, 24 Blatchf. 173; 29 Fed. Rep. 341; *United States v. Babcock*, 3 Dill. 566. But the mere fact that statutes have conferred upon courts of law the power to compel parties to the record to testify as witnesses does not deprive a party in courts of the United States of the right of discovery in equity when seeking equitable relief. Such legal remedy is not as effectual as the equitable remedy: *Smythe v. Henry*, 41 Fed. Rep. 705, 715.

*When the Power to Compel the Production of Books, etc., will be Exercised.*—It is said that, unless for some satisfactory reason to be made apparent to the court, each party ought to be required, when it is desired, to disclose to the other any books, papers, and documents within his power which may contain evidence pertinent to the issue to be tried: *Powers v. Elmendorf*, 4 How. Pr. 60. And the discretion vested in the court on such an application should be liberally exercised to enable parties to properly prepare for trial: *Hart v. Ogdensburg etc. R. R. Co.*, 69 Hun, 497; compare *Richmond's Appeal*, 59 Conn. 226; 21 Am. St. Rep. 85. But the enactments upon the subject generally make it a condition that the books, etc., required shall contain evidence relating to the merits of the case: *Keeler v. Dusenbury*, 1 Duer, 660. And it is held that the party desirous of a discovery must show, to the satisfaction of the court or officer, that the books or papers which he seeks to have produced contain evidence relating to the merits of the action. He must state the facts and circumstances upon which the discovery is claimed, and the statement of the facts must be sufficient to satisfy the court or officer that there is reason to believe that the books or papers which the party seeks to obtain do in fact contain material evidence: *Davis v. Dunham*, 13 How. Pr. 425; *New England Iron Co. v. New York etc. Imp. Co.*, 55 How. Pr. 351; *Thompson v. Erie Ry. Co.*, 10 Abb. Pr., N. S., 212, 225. Enough must be stated to justify a presumption that the documents relating to a specified subject matter exist, are in possession or control of the other party, and that they will tend to establish some claim or defense of the party seeking for the discovery: *Hoyt v. American Exchange Bank*, 1 Duer, 655; *Ahhymeyer v. Healy*, 12 N. Y. St. Rep. 677. Some necessity for inspection must exist before it can be directed, and curiosity alone will not suffice: *Holtz v.*

*Schmidt*, 2 Jones & S. 28; *Bien v. Hellman*, 2 Misc. N. Y. 168; 18 N. Y. Supp. 860. An order should not be made to produce documents which may be of no use when produced: *Whitman v. Weller*, 39 Ind. 515. The books or papers called for should be designated with a reasonable degree of certainty, and the facts expected to be proved by them should be stated, so that they may appear to be pertinent to the issue, or relative to the matters in dispute: *Eschbach v. Lightner*, 31 Md. 528; *Cornish v. Wormser*, 53 Hun, 40; *Halsted v. Halsted*, 23 N. Y. Supp. 191; *Dickie v. Austin*, 65 How. Pr. 420. Such are a few of the more general rules applicable where the production of books and papers is desired before trial.

But the right to the inspection of books and papers with a view to the discovery of evidence is not to be confounded with the production of them on the examination of a party as a witness before trial. A party examined before trial may be required by *subpœna duces tecum* to produce books and papers, but they will be used upon the examination in the same way only as if produced on his examination as a witness at the trial: *Smith v. McDonald*, 1 Abb. N. C. 350. Such production does not entitle the adverse party to a discovery of their contents, nor to an inspection or examination of them, nor to a conducting of the examination with respect to them otherwise than as at the trial: *McGuffin v. Dinmore*, 4 Abb. N. C. 241; *De Barry v. Stanley*, 5 Daly, 412. And see *Keenan v. O'Brien*, 4 N. Y. Supp. 66; *Bloom v. Pond's Extract Co.*, 27 Abb. N. C. 366; *Lefferts v. Brampton*, 24 How. Pr. 257.

To justify an order for the production of a book or paper it should be shown to be in the hands of the party against whom such order is asked: *Whitman v. Weller*, 39 Ind. 515; *Woods v. De Figaniere*, 25 How. Pr. 522; *McCall v. Moschcowitz*, 10 Civ. Proc. 107, 129; though, if shown to be in the possession of the servant or agent of such party, it is sufficient: *Farquharson v. Balfour*, 1 Turn. & R. 190; *Eager v. Wiswall*, 2 Paige, 369; *Reid v. Langlois*, 1 Macn. & G. 627, 636. In an action of trespass to land against the committee of a lunatic whose title deeds were in the custody of the court, having jurisdiction in lunacy, it was held that an order on the defendant for inspection of the documents ought not to be made, as they were not in his possession or control: *Virian v. Little*, 11 Q. B. Div. 370. And a person not a party litigant cannot be ordered to produce a document belonging to him, unless the parties to the proceedings are entitled to its production for the purpose of justice at the moment the order is made, as for the purpose of a pending trial, hearing, or application, or in order to carry out or complete an order which has already been obtained: *Elder v. Carter*, 25 Q. B. Div. 194. Compare *Davenbagh v. McKinnie*, 5 Cow. 27. And an infant party to an action cannot be compelled to make a discovery of documents: *Curtis v. Mundy* (1892), 2 Q. B. 178; *Mayor v. Collins*, 24 Q. B. Div. 361. But officers of a corporation may, in proper cases, be required to produce books and papers of the corporation for inspection: *La Farge v. La Farge Fire Ins. Co.*, 14 How. Pr. 26; *Post v. Toledo etc. R. R. Co.*, 144 Mass. 341; 59 Am. Rep. 86. And it was held that a corporation not a party to the suit might be compelled to produce its books and papers in evidence, which might be necessary and vital to the rights of litigants, and that considerations of inconvenience must give way to the paramount rights of parties to the litigation: *Wertheim v. Continental Ry. and Trust Co.*, 15 Fed. Rep. 716. But see *Morgan v. Morgan*, 16 Abb. Pr., N. S., 291.

It is not necessary, in order to warrant the court to order the production of a document, that the applicant should show a property interest or title

therein, but it is sufficient for him to show that he is justly entitled thereto by way of evidence in the preparation and trial of his case, and that such evidence is necessary to enable him fully to prosecute or defend: *Arnold v. Pawtuxet etc. Water Co.*, 18 R. L. He should, however, set forth particularly the reasons which render it essential to the preparation of his case that the order asked for should be made, so that the court may determine whether or not the necessity exists: *Ely v. Mowry*, 12 R. L. 570. And if the application shows that it is merely an attempt to "fish for evidence," or to "draw the fire" of the opposite party, for the purpose of either making a case or of "cooking up" a defense, or stated negatively, if it does not show that the applicant is fairly entitled to the evidence sought, in order to enable him to properly prepare and try his case, it should be denied: *Arnold v. Pawtuxet etc. Water Co.*, 18 R. L. And the application will be denied where it appears that the applicant might have access to the books or papers without an order: *McAllister v. Pond*, 15 How. Pr. 299; 6 Duer, 702. Under a general power of the court to allow the inspection of papers, such power may be exercised even in cases of libel when the pleadings refer to any document: *Kraus v. Sentinel Co.*, 62 Wis. 660; *Dacey v. Pemberton*, 11 Com. B., N. S., 628.

In an action to recover penalties under a statute the defendant can neither be compelled to testify against himself, nor to produce his books and papers to be used as evidence against him. The court is bound to protect him in the enjoyment of his privilege in this respect, and his refusal to produce his books, etc., cannot be commented on or used as affording any presumption against him: *Logan v. Pennsylvania R. R. Co.*, 132 Pa. St. 403; *Boyle v. Smithman*, 146 Pa. St. 255, 274. The seizure or compulsory production of one's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty or forfeiture is held to be equally within the prohibition of the fifth amendment to the federal constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself." Inspection may be had, not only as between plaintiffs and defendants, but as between two defendants, if there are rights which have to be adjusted between them in the action, and to which such inspection is material. But inspection to one defendant of property belonging to another defendant was denied, there being no right in question as between them in the action: *Shaw v. Smith*, 18 Q. B. Div. 193.

Discovery and inspection of accounts may be had not only in a suit between partners for an accounting, but also where the relation between the parties has been that of employee and employer, or of co-workers, as where the plaintiff had been employed for a share of profits in lieu of salary: *Vieller v. Oppenheim*, 31 Abb. N. C. 181; *Boyd v. United States*, 116 U. S. 616. The objection that the production of documents will tend to criminate the party in whose possession they are must be taken by the party himself on oath: *Kraus v. Sentinel Co.*, 62 Wis. 660.

*What Books, Papers, or Documents are Subject to Discovery and Inspection.*—Documentary evidence is held to include books, papers, accounts, and the like: *In re Shephard*, 3 Fed. Rep. 12; *Ansen v. Tuska*, 19 Abb. Pr. 391. A book kept by the plaintiff as a medical officer, and containing entries of professional visits, was referred to as a "document": *Merrick v. Watley*, 8 Ad. & E. 170, 172. The book containing a record of the transactions and proceedings of an association, prior to and after its incorporation, is held to be a document within the meaning of a statute providing for the production

in court, or for the inspection of one of the parties, of any document in the possession or control of the opposite party: *Arnold v. Pawtuxet etc. Water Co.*, 18 R. I.

Telegraphic messages in the hands of the officers of the telegraph company must be produced when ordered by a *subpoena duces tecum*: *Ex parte Brown*, 72 Mo. 83; 37 Am. St. Rep. 426; *United States v. Hunter*, 15 Fed. Rep. 712; *United States v. Babcock*, 3 Dill. 566; *Hensler v. Freedman*, 2 Para. Sel. Cas. 274. And it was held that a *subpoena duces tecum*, requiring a witness not a party to the suit to produce certain drawings, must be obeyed, although the papers related to a valuable secret method of producing a manufactured article: *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191. But such a writ can only be used to require the production of documents, and a piece of metal in the nature of a form or model is not the subject thereof: *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 191; and so of patterns for stove castings: *In re Shephard*, 3 Fed. Rep. 12.

A person is not exempted from producing books or papers material to an inquiry in the courts of justice merely because they are private: *Burnham v. Morrissey*, 14 Gray, 226; 74 Am. Dec. 676; *In re Dunn*, 9 Mo. App. 255. But when the book contains other entries of a private nature inspection will be ordered of only so much as relates to the matter in suit: *Elder v. Bogardus*, Edm. Sel. Cas. 110. Letters between a party and his friends or agents are not privileged from discovery: *Taylor v. Milner*, 11 Ves. 41; *Greenlaw v. King*, 1 Beav. 137; *Whitbread v. Gurney*, 1 Younge, 541; *Hopkinson v. Lord Burghley*, L. R. 2 Ch. 447. And a discovery was ordered where the plaintiff had in his possession a letter written to him by the defendant, and the answer thereto, written upon the same paper, and containing evidence material to the defense: *Livermore v. St. John*, 4 Robt. 12. But an attorney cannot be compelled to produce papers of his client's in his possession: *Durkes v. Leland*, 4 Vt. 612; *Crosby v. Berger*, 11 Paige, 377; 42 Am. Dec. 117; *Mitchell's case*, 12 Abb. Pr. 264; *State v. Douglass*, 20 W. Va. 770; *Commonwealth v. Moyer*, 15 Phila. 397. And it was held that where the party against whom a discovery is sought is a physician and surgeon, and resists an inspection of his books upon the ground that they contain, as part of his records, information derived from his patients, which is of a privileged character, the application will be denied: *Mott v. Consumers' Ice Co.*, 52 How. Pr. 148, 244. And where papers called for cannot be exhibited without injury to the public their production will be denied: *Regina v. Russell*, 7 Dowl. Pr. 693. And see *Corbett v. Gibson*, 16 Blatchf. 334. But a transcript of shorthand notes of proceedings in open court is not privileged: *In re Worswick*, 38 Ch. Div. 370. A party to a suit cannot be required to produce documents relating to the compromise of a dispute between himself and a person not a party to the suit: *Warrick v. Queen's College*, L. R. 4 Eq. 254.

Where, under an order for discovery, a book is produced containing also matter which is not proper evidence in the cause, the party producing the book is at liberty to seal up such portion: *Titus v. Cortelyou*, 1 Barb. 444; *Carew v. White*, 5 Beav. 172; *Hunt v. Hewitt*, 7 Ex. 236. A statutory provision for the inspection of books, papers, or documents in the hands of the adverse party has no application to copies of a public record open to the inspection of both parties, and a copy of which may be obtained by either or both parties upon payment of the required fees: *Spielman v. Flynn*, 19 Neb. 342.

The principle upon which courts of equity proceed in compelling a discovery of books, papers, and documents has been held to cover and authorize



the compulsory discovery, in a proper case, of things or substances other than books, papers, etc.: See *Lumb v. Beaumont*, 27 Ch. Div. 356; *Morris v. Howell*, L. R. 22 Ir. 77. And the doctrine that the court has inherent power to compel a party to submit to an examination of his person, in a proper case, has been maintained, and an order for the inspection of the body of the plaintiff in an action for a personal injury in advance of the trial has been sustained in numerous instances: See *Schroeder v. Chicago etc. R. R. Co.*, 47 Iowa, 375; *Atchison etc. R. R. Co. v. Thul*, 29 Kan. 466; 44 Am. Rep. 659; *White v. Milwaukee Ry. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764, and note; *Sidekum v. Wabash etc. R. R. Co.*, 93 Mo. 400; 3 Am. St. Rep. 549, and extended note on the subject; *Richmond etc. R. R. Co. v. Childress*, 82 Ga. 719; 14 Am. St. Rep. 189; *Hatfield v. St. Paul etc. R. R. Co.*, 33 Minn. 130; 53 Am. Rep. 14. On the other hand, the power of the court to make such order is peremptorily denied in the absence of a statute conferring the right: *McQuigan v. Delaware etc. R. R. Co.*, 129 N. Y. 50; 26 Am. St. Rep. 507; *Roberts v. Ogdensburgh etc. R. R. Co.*, 29 Hun, 154; *Parker v. Enslow*, 102 Ill. 272; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401. And it is held by the supreme court of the United States that an order in an action for a personal injury, subjecting the plaintiff's person to examination by a surgeon, without the plaintiff's consent and in advance of the trial, is not according to the common law, to common usage, or to the statutes of the United States, and a federal court has no power to subject a party to such an examination: *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 257.

The rule is changed in New York by statute (Laws of 1893, c. 721), amending section 873 of the Code of Civil Procedure, providing that, in actions for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial, may, if the defendant applies therefor, direct that the plaintiff submit to a physical examination. But such amendment does not authorize an order directing a physical examination apart from or independent of an examination of the plaintiff as a witness before trial. And the power conferred by the amendment should never be used in such a way as to leave any doubt as to the fairness and good faith of the proceeding: *Lyon v. Manhattan Ry. Co.*, 27 N. Y. Supp. 966; 7 Misc. 401; affirmed 142 N. Y. 298.

In England the court of common bench refused an order for the inspection of a building, on the application of the plaintiff in an action for work and labor performed by him thereon, on the ground of want of power: *Newham v. Tate*, 1 Arnold, 244; 6 Scott, 574; *Turquand v. Strand Union*, 8 Dowl. Pr. 201. And see *Downey v. MacAleenan*, 16 N. Y. Supp. 916; *Ansen v. Tuba*, 19 Abb. Pr. 391; *Cooke v. Lalance etc. Mfg. Co.*, 29 Hun, 641. But it is held to be within the power of the court to allow a party to an action to take photographs of documents in the possession of the other party: *Krooks v. L. & C. Wire Co.* (1893), 2 Q. B. 191. And see *Monroe's Estate*, 23 Abb. N. C. 83.

*Decisions Relating to Procedure, etc., on Application for Order to Produce Books or Papers.*—Under the federal statute (U. S. Rev. Stats., sec. 724), the applicant should move for a rule requiring the production of the books or papers desired, describing them with sufficient certainty, and stating, to the best of his knowledge, information, and belief, that they will tend to prove the issue in his favor. The motion should further state the facts which the books or papers will tend to prove pertinent to the issue. And the truth of the allegations stated in the motion should be veri-



fied by the affidavit of the mover or his agent, and the materiality of the testimony ought to be certified to by counsel of the mover. Notice must be given the party required to produce the books or papers, or his attorney, in sufficient time for the party to appear and show cause why the rule should not be made, and, if issue is made on the motion, the court may grant or refuse the rule according to the proof: *Lowenstein v. Carey*, 12 Fed. Rep. 812; *Jacques v. Collins*, 2 Blatchf. 23; *Bas v. Steele*, 3 Wash. C. C. 381; *Thompson v. Selden*, 20 How. U. S. 194.

The proceeding to compel the production of books or papers under the New York Code of Civil Procedure must be by a verified petition praying for the discovery or inspection sought, and the only order that can be made in the first instance is one directing the party against whom the discovery or inspection is asked to allow it, or, in default thereof, to show cause why it should not be done. In other words, a peremptory order compelling the production of books or papers for examination and inspection cannot be granted *ex parte*: *Dick v. Phillips*, 41 Hun, 603. Compare *Cutter v. Pool*, 54 How. Pr. 311; 3 Abb. N. C. 130. The petition must state positively what information is wanted, and that the books or papers referred to contain such entries. It is not enough to show that they probably will furnish the desired information, but the petition should point to the places where the information sought for exists, and describe the entries: *Dickie v. Austin*, 65 How. Pr. 420; *Jackling v. Edmonds*, 3 E. D. Smith, 539; *Hunt v. Hewitt*, 7 Ex. 236; *Walker v. Granite Bank*, 44 Barb. 39. But it is held that absolute proof that the documentary evidence exists is not required: *Ahlmyer v. Healy*, 12 N. Y. St. Rep. 677.

The court has power, in a proper case, to order a discovery or inspection of books and papers to enable a party to frame a bill of particulars: *Prince v. Currie*, 2 How. Pr. 119; *Ball v. Evening Post Pub. Co.*, 48 Hun, 149. But the affidavit and order in such a proceeding should definitely describe the books and papers to be produced, so that the party proceeded against may know what to admit or deny, and that the court may know, when books and papers produced, whether or not they are such as the order calls for. The general rule applies that an order for discovery must be reasonably definite and explicit, and cannot be so vague that what books and papers are desired cannot be determined by the court upon a reading thereof: *Cornish v. Wormser*, 53 Hun, 40. The moving party should show, at least *prima facie*, such fact or facts as would enable the court to exercise its discretion as to whether the order should be granted. The bold statement that the papers desired to be inspected "contain evidence relating to the merits of the action" is held to be nothing more than an expression of the plaintiff's opinion, and cannot be regarded as a statement of any fact: *Jenkins v. Bennett*, 40 S. C. 393. If the discovery is plainly attainable by competent and available testimony a production of books should not be allowed without special circumstances: *Dickie v. Austin*, 65 How. Pr. 420. And the applicant must have demanded and been refused the privilege of inspection before an order for production and inspection will be made: *Gross v. Bock*, 15 N. Y. St. Rep. 965; 14 Civ. Proc. 314; *Walmsley v. Nelson*, 3 Abb. N. C. 127. And the right to an order for production may be lost by laches: *Hooker v. Matthews*, 3 How. Pr. 329. And the fact that the documents can be procured by a *subpœna duces tecum* is, in general, ground for a denial of the application: *Low v. Graydon*, 14 Abb. Pr. 443; *McKeon v. Lane*, 2 Hall, 520; *Stacker v. Gaunt*, 12 N. Y. Leg. Obs. 132. And it is well settled that a mere fishing examination will not be allowed:

*Brownell v. Bank of Gloversville*, 20 Hun, 517. So, if a defendant in positive terms denies that he has possession of the books or papers called for, an order for their production will be denied: *McIlhenny v. Magie*, 13 Civ. Proc. R. 16. But the mere fact that the plaintiff has had, from time to time, opportunity to examine the books or papers, is not alone sufficient ground for refusing an application for discovery and inspection in which he may have the aid of an expert: *Vieller v. Oppenheim*, 31 Abb. N. C. 181.

*Custody of the Documents to be Inspected.*—When a document is produced for inspection, under an order of the court, the court will not compel the impounding of it, or the depositing of it with an officer of the court or a third person. But the owner is allowed to retain the possession of it, the order merely permitting its inspection in his hands, or in the hands of his attorney, by the opposite party or by witnesses: *Ely v. Mowry*, 12 R. L. 570, 572; *Hilyard v. Township of Harrison*, 37 N. J. L. 170, 174. The court will not go beyond an order for inspection, by an order to deposit for safe custody, unless in a special case establishing danger that the documents may not be produced: *Beckford v. Wildman*, 16 Ves. 438. And if a party has deposited his books in the clerk's office, under an order to produce, he is entitled to withdraw them after a reasonable time allowed for inspection and making extracts: *Stow v. Betts*, 7 Wend. 536.

Although a defendant cannot refuse to produce private and confidential letters from a stranger, on the ground that the writer forbids their production, yet the plaintiff will be put under an undertaking not to use them for any collateral object: *Hopkinson v. Lord Burghley*, L. R. 2 Ch. App. 447. And if, under an order of court, books are deposited in the master's office, with the parts not relating to the controversy sealed up, and the adverse party surreptitiously breaks open the parts so sealed up, such act is a contempt of court, and is punishable as a contempt: *Burrow's case*, 8 Ves. 535; *Bateman v. Conway*, 5 Brown Parl. C. 84; *Dias v. Merle*, 2 Paige, 494. It is not to be assumed in advance, however, that an abuse of the privilege of inspecting books or papers is intended, so as to warrant a modification of the order granting such inspection, before facts arise which show an attempt to abuse the privilege, or to make use of it for a purpose other than that for which it was granted: *Veiller v. Oppenheim*, 75 Hun, 21.

*Enforcement of Order for Production.*—An order for the production of documents is enforced by attachment, or other process of contempt, in the usual manner: 2 Daniell's Chancery Pleading and Practice, 6th Am. ed., 1841. It was held that a rule to show cause why an attachment should not issue will be ordered on a petition for the production of papers to enable a party to declare: *Birdsall v. Pixly*, 3 Wend. 425.

The insertion of a clause in an order for production, declaring the consequences of an omission to comply therewith, cannot affect the validity of the order. Such clause is entirely harmless: *Rice v. Ebele*, 65 Barb. 185; 55 N. Y. 518.

*Appeal.*—In New York the supreme court, at general term, has power to review the exercise by the special term of its discretionary powers on an application for a discovery of books and papers under the provisions of the Code of Civil Procedure: *Thompson v. Erie Ry. Co.*, 9 Abb. Pr., N. S., 212, 230; *Hart v. Ogdensburgh, etc. R. R. Co.*, 69 Hun, 497. But the matter is one within the discretion of the supreme court, and its decision based upon the merits of the application is not reviewable in the court of appeals: *Finley v. Chapman*, 119 N. Y. 404.

## PRIDDY v. GRIFFITH.

[150 ILLINOIS, 560.]

**DOWER IN MINES—WASTE.**—One occupying land as dower cannot commit waste on such land, and the opening of coal or other mines thereon amounts to waste. But it is settled in Illinois that, where mines are already opened upon land assigned as dower, the widow has the right to operate them and receive the proceeds thereof.

**WIDOW MAY BE ENDOWED OF MINES** opened by the heir or owner of the fee after her dower attaches and before there has been any assignment, and it is not waste for her to work mines opened, although they had been abandoned before the death of her husband. She may construct new approaches and not be guilty of waste.

**DOWER IN LEASED LANDS—RENT OR ROYALTY TO WIDOW.**—Where there is a valid subsisting lease, executed by the husband in his lifetime, under which the lessees may, at any time, open mines, and by the terms of which one dollar per acre rent or royalty is to be paid annually to the lessor, his heirs, or other legal representatives who, at the time, shall be legally entitled to the life estate or fee simple title to the land, until the mines are opened, and certain fixed royalties after the mines are opened and worked, the widow of the lessor will be entitled to the rent or royalty upon lands assigned as dower after the assignment. And should the lessees open mines on the lands assigned as dower, without the consent of the widow, she would be entitled to the royalty named in the lease.

**MINING LANDS—CONSTRUCTION OF LEASE—ROYALTIES.**—A lease of coal lands conferring mining rights and fixing the royalty to be paid for coal taken out also provided that, until the mines should be opened, the lessee, or its successor or assigns, should pay on the first day of January to the lessor, or those succeeding to his rights, one dollar per acre of the tract leased. It was held that, under the terms of this lease, the one dollar per acre should be treated as the annual rental for lands, and not mines, and that the widow of the lessor was entitled to such rental after the assignment of her dower and until the opening of mines, if any were opened on her lands, after which she should receive the royalty fixed in the lease.

TINSLEY PRIDDY, and his wife, Sarah Priddy, leased coal lands for mining purposes to certain parties, which mining rights, by assignment, afterward became the property of the Carbondale Coal and Coke Company. The assignee and lessors then made a new contract, covering the same lands, by the terms of which the lessee, its successor or assigns, should pay on the first day of January to the lessors, their heirs, or other legal representatives who, at the time, should be legally entitled to the life estate or the fee simple ownership of the land, the sum of one dollar for each acre of the tract out of which no coal should at that time have been mined and removed, and a royalty to be paid after the open-

ing and working of the mines was also fixed. Tinsley Priddy died in 1885 while residing on this land, with his family, as a home. In 1891 suit was brought, seeking the assignment of dower and homestead to the widow, Sarah Priddy, and the partition of the remainder of said land among the heirs, and for the distribution of mining royalty accumulated, and a declaration of the rights of the parties as to the future accumulations of royalty, the parties to the suit being the widow, Sarah Priddy, and the heirs of Tinsley Priddy, deceased. As to the royalties or rents for the years subsequent to 1885, it was decreed that the widow had no rights therein, and that the future royalties on the whole lands, including that assigned as dower and homestead, should be the property of the heirs or other assigns, and the widow was entitled to no portion of such royalty. The widow, Sarah Priddy, and others, brought writ of error.

*Clemens and Warder*, for the plaintiffs in error.

*V. A. Schwartz*, for the defendants in error.

565 BAKER, J. There is no objection urged against the decree assigning dower or partition of the land. The only question presented to this court by the record is, Did the circuit court err in holding 566 that the widow was not entitled to the rents or royalties due, and to become due, by the terms of the foregoing lease from the coal company?

It is a well-established rule of law that a person occupying land as dower cannot commit waste upon such land, and that the opening of coal or other mines thereon amounts to waste. But it is equally well settled in this state that, where mines are already opened upon land assigned as dower, the widow has the right to operate the same and receive the proceeds thereof: *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263, and cases there cited. It is true, in this case, the mines have not been actually opened upon the lands assigned as dower, but there being a valid subsisting contract, executed by the husband in his lifetime, under which the lessees may, at any time, open the mines, and by the terms of which one dollar per acre rent or royalty is to be paid annually to the lessor, his heirs, or other legal representatives who, at the time, shall be legally entitled to the life estate in or fee-simple title to the land, until the mines are opened, and certain fixed royalties after the mines are opened and worked, it seems clear to us, that in justice the widow is entitled to that rent or royalty

after the assignment of her dower. Should the lessees open mines on the lands assigned as dower, as, by the terms of the lease, they may, without the consent of the widow, she certainly would, upon the principle announced in the above-cited case, be entitled to the royalty named in the lease. The act of opening the mine would, in such case, be practically the act of the husband, viz., authorized by him. Then, in contemplation of law, for the purposes of this case, the mine may be treated as already opened when the widow's right of dower attached.

In the case of *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, the question was, Had the widow the right to the mineral rents and profits of mines opened by the owner of the fee after the right of dower had attached? This court said: "On principle, why may she not be endowed of mines open by the heir or owner <sup>567</sup> of the fee, after dower attaches and before there has been any assignment? By all the decisions it is not waste for her to work mines opened, although the same had been abandoned before the death of her husband. She may construct new approaches and not be guilty of waste. On the same principle, if the cases on this question can be said to rest upon any principle, she could work mines opened by the heir without being guilty of waste, . . . there is no reason why the wife may not be entitled to be endowed of mines opened by the heir or owner of the fee after the right of dower attaches, and before there has been any assignment, as well as in mines opened by the husband.

We think, upon the reasoning of said case, appellant is entitled to the one dollar per acre after the assignment of her dower and until the opening of mines, if any are opened, on her land, after which she should receive the royalty mentioned in the lease. It is also clear from the terms of the lease under which the fund in question accrued, that the one dollar per acre rent, to be paid until the mines should be opened, is to be treated as the annual rental for lands, and not mines, and, if so treated, appellant is clearly entitled to the rent arising from the land set off to her by the assignment of her dower.

The bill in this case seeks the distribution of funds accruing before and after the assignment of dower. As to that part accruing before the assignment, no right exists in the widow, but, for the reasons stated, she should receive all that has accrued or will accrue, during the continuance of her

life estate, from the lands set off to her by the assignment of her dower and homestead.

The decree of the circuit court will be reversed, and the cause will be remanded to that court, with directions to enter a decree in conformity with the views here expressed.

**DOWER IN MINING PROPERTY.**—A widow is entitled to dower in mines opened and worked at the time of her husband's death: *Hendrix v. McBeth*, 61 Ind. 473; 28 Am. Rep. 680; *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263. A widow is entitled to dower in the whole of a slate quarry of which her husband died seized, which lay mostly underground, but partly above ground, although but one quarter had been dug over: *Billings v. Taylor*, 10 Pick 460; 20 Am. Dec. 533.

**DOWER IN RENT.**—A widow may be endowered of rent: *Chase's case*, 1 Bland, 206; 17 Am. Dec. 277. See the extended note to *Sanders v. McMillan*, 39 Am. St. Rep. 38.

## BARROWS v. CITY OF SYCAMORE.

[150 ILLINOIS, 583.]

**PUBLIC STREETS—TO WHAT USES MAY BE APPROPRIATED—RAILWAYS THEREIN.**—Having the free and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the primary object for which they were established, namely, ordinary passage and travel. In the application of this rule a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer, and gas pipes under, public streets, and property owners can neither enjoin such use, nor recover damages to property occasioned thereby.

**PUBLIC STREETS—OBSTRUCTIONS IN—STAND-PIPE.**—Water and gas pipes, with hydrants, lamp-posts and other appliances, are necessary for the distribution of water and light throughout the municipality, and the streets may be legitimately used for that purpose, but water or gas works themselves cannot be lawfully built in a public street, as not being inconsistent with the public use. And placing a stand-pipe in a public street, near the building thereon, is an unlawful use of such street, and the dimensions of the structure, and the manner of operating it affect only the question of damages.

**PUBLIC STREETS—OBSTRUCTIONS IN—RIGHT OF ACTION.**—No action will lie for an obstruction in a public street if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value. To warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. When the action is by an individual the special injury is the gist of the action, and unless it is alleged and proved there can be no recovery.

**ACTION FOR OBSTRUCTING STREET—PLEADING.**—In an action against a city for an injury to the plaintiff's property caused by the erection of a stand-pipe in the street, certain counts of the declaration alleging that the plaintiff's property had been depreciated in value because of the danger of the building being destroyed or damaged by the stand-pipe falling or being blown upon it, or by bursting and flooding it with water, but alleging no fact upon which the apprehension of such danger could be based, fail to state a good cause of action. But a count in such declaration averring that "said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting-room in the southwest corner," etc., is a sufficient allegation of special injury to entitle the plaintiff to a recovery.

**STREET OBSTRUCTIONS—DAMNUM ABSQUE INJURIA.**—Certain injuries necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, as, for instance, the building of a jail, police station, or the like, causing a direct depreciation in the value of neighboring property, are classed among cases of *damnum absque injuria*, for which the law affords no relief.

**THE PUBLIC ALONE CAN COMPLAIN OF OBSTRUCTIONS TO STREETS** resulting in no special injury to an individual.

*Jones and Rogers*, for the appellant.

*Carnes and Dunton*, for the appellee.

590 **WILKIN, C. J.** This is an action on the case, by appellant, against appellee, in the circuit court of De Kalb county, to recover damages for an alleged injury to real property. The circuit court sustained a demurrer to the declaration, and rendered judgment against the plaintiff for costs, from which she appealed to the appellate court for the second district, and from a judgment of affirmance in that court she prosecutes this appeal.

The cause of action set up in the declaration is, that plaintiff is the owner of a certain lot in the city of Sycamore, with a two-story building on the southwest corner thereof, fronting south and west, on State and Main streets, which she used and occupied as a residence and hotel; that the city "injuriously, unjustly, and wrongfully constructed, or caused to be constructed and erected, at or near the center of the intersection of said streets, and at a distance of about fifty-six and one-half feet from said hotel building, a stand-pipe or water-tower," fifteen feet in diameter and about one hundred and thirty-five feet high, having a capacity of one hundred and seventy-nine thousand gallons, made of steel or iron plates five feet wide, riveted together, the lower course being nine-sixteenths of an inch thick, and those above diminishing to the upper course, which was three-sixteenths of an inch. This structure is



alleged to have caused an injury to plaintiff's building, which is set forth in each of the four counts of the declaration, as follows:

First count: "Which stand-pipe, by reason of the fact that there is a constant apprehension that it may fall over upon said hotel building, and by its great weight injure, crush, or <sup>501</sup> destroy the same, or that it might blow over upon said property, or burst and flood the same, greatly depreciates in value the premises for resident, hotel, and business purposes, and especially greatly depreciates in price the market value of said premises."

Second count: "Which stand-pipe is liable to fall or blow over upon said premises, and by its great weight injure, crush, or destroy said hotel building, and is liable to burst and flood said premises, and thus injure the same, or destroy the said hotel building, and thereby greatly depreciates in value said premises," etc.

Third count: "Which stand-pipe is of a dangerous character, and is liable to fall or blow over upon said hotel building, and by its great weight injure, crush, or destroy the same, and is liable to burst and flood said premises, and thus injure the same, or destroy the said hotel building, and the stand-pipe is a constant menace to plaintiff's property, and the liability of said structure, and structures of like character, to fall or blow over or burst, has thereby greatly depreciated in value said premises for resident, hotel, or other business purposes, and especially greatly depreciates in price the market value of said premises."

Fourth count: "And by reason of defendant constructing, or causing to be constructed, said stand-pipe, as above stated, in the public streets of said city, and so near to plaintiff's hotel building, said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting-room in the southwest corner of said hotel building, and obstructs the view from said hotel building; and said stand-pipe being of so great height, and in front of and near said plaintiff's said premises, casts a shadow upon said hotel building, and makes the appearance of said premises unsightly, and otherwise injuriously affects said premises, and thus plaintiff's said premises are less convenient and comfortable for resident and hotel purposes; and, by reason of the <sup>502</sup> wrongful acts and doings of the defendant, as aforesaid, and the injuries done to plaintiff's property, as aforesaid, the

market value of plaintiff's said premises is thereby greatly decreased."

Each of these counts concludes with the averment, "that by means of the premises the said defendant has greatly injured and damaged the said property of plaintiff, within the meaning of the constitution and laws of the state of Illinois, yet the said defendant has never paid, nor offered to pay, to the said plaintiff any of the damage so injuriously and unjustly caused to the plaintiff's said property, nor has any proceeding been instituted by the defendant for the purpose of having just compensation therefor ascertained; and the plaintiff avers, that by reason of the premises above set forth the plaintiff's said property has been greatly damaged and depreciated in value, to the damage of said plaintiff of the sum of three thousand (\$3,000), and therefore she brings her suit," etc.

It thus appears that the declaration proceeds both upon the ground that placing the stand-pipe in the street was wrongful, and, even if authorized by law, plaintiff's property could not, under the constitution, be damaged thereby without just compensation, which had not been ascertained. The demurrer was, in effect, general to each count, viz: it made no objection to the declaration on account of duplicity, or the mere form of pleading, and therefore the only question presented for our decision is, Does either of the counts state, in substance, a good cause of action?

It is insisted on behalf of the city, that being the owner of the fee in the streets, and having the absolute control over them, it had a right to build the stand-pipe in them, and that if injury resulted thereby to plaintiff's property, it is *damnum absque injuria*. The soundness of this position depends upon whether the placing of a structure, like that described in the declaration, in the streets of a city, is consistent with the objects for which streets are established and held by municipal authorities in trust for the public use. The general rule long<sup>593</sup> recognized by this court is, that having the fee and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established: *City of Quincy v. Bull*, 106 Ill. 337, and cases there cited. In the application of the rule it has been held in the case cited and others that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer, and gas pipes under, public streets, and that property owners could neither enjoin such use, nor

recover damages to property occasioned thereby. Laying pipes under the streets for the purpose of distributing water and gas and carrying off sewage is lawful, both because it is necessary for the health, comfort, and convenience of the inhabitants, and because it in no way interferes with, and is not incompatible with, the use of such streets for public travel. Railroad tracks may be lawfully laid in streets for the reason, as stated in *Moses v. Pittsburgh etc. R. R. Co.*, 21 Ill. 522, cited in *Quincy v. Bull*, 106 Ill. 337: "A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." It was, however, held in *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619, and cases cited to the same effect in *Legare v. City of Chicago*, 139 Ill. 46, 32 Am. St. Rep. 179, that, in permitting the use of streets for other purposes than public thoroughfares, "the city has no right to so obstruct them as to deprive the public and adjacent property holders of their use as streets. The primary object is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use."

It does not follow, therefore, that because railroad tracks may be put on or pipes under the streets, structures like the one described in this declaration can be built in them. Water and gas pipes, with hydrants, lamp-posts, and other appliances, are necessary for the distribution of water and light over the city, and the streets may be legitimately used for that purpose; but it would scarcely be contended that the <sup>504</sup> water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use. In fact, directly the contrary was held in *City of Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77, as to water-works. It was there said: "But it is not conceded that the erection of a water-tank in the center of the street, occupying one-half of the width thereof, and the erection and operating of a steam-engine in connection therewith, even for the purposes of supplying the city and the residents thereof with water, is one of the uses of a street, as such, for which the ground may be appropriately used under a dedication thereof as a street. The owner of a lot adjoining a street does not take the same subject to any such easement." It is true, it was stated in that case that the proof did not show in whom the fee of the street was vested; but if the same could not be said here, there being no allegation in the declaration as to that fact,

still, as shown by *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619, and cases there referred to, the fact that the title is in the city gives it no right to pervert its use as a street. The fee-simple title, though in the city, is held in trust for the public use as a street. Nor do we regard the fact that the tank in *City of Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77, occupied more of the street, and was filled by machinery immediately attached, also in the street, distinguishes that case in principle from this. A stand-pipe is but a part of the machinery and appliances with which water is forced into the pipes throughout the city. There is no necessity for placing it in a public street, and, so far as appears in this case, neither the health, comfort, nor convenience of the public or individual citizens is promoted by so doing. Therefore, placing it there was an unlawful use of the street, and the dimensions of the structure, and the manner of operating it, in the decision of this case, affect only the question of damages to be hereafter considered.

Our opinion then is, that the allegations of the declaration admitted by the demurrer show that the city wrongfully placed <sup>505</sup> the structure in its streets. It does not, however, follow that a good cause of action in the plaintiff is shown by her declaration. It is well settled that for obstructions to streets, resulting in no special injury to an individual, the public alone can complain: *McDonald v. English*, 85 Ill. 232; *City of Morrison v. Hinkson*, 87 Ill. 587; 29 Am. Rep. 77. The individual right, under our present constitution, is thus stated in *Rigney v. City of Chicago*, 102 Ill. 80: "While it is clear that the present constitution intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So, as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must

appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. When the action is by an individual the special injury is the <sup>gist</sup> gist of the action, and unless it is alleged and proved there can be no recovery": *McDonald v. English*, 85 Ill. 232.

Under this rule it is too clear for argument that neither of the first three counts of the declaration shows a right of action in the plaintiff. The special injury attempted to be set up in each of these counts is, that her property has been depreciated in value because of the danger of the building being destroyed or damaged by the stand-pipe falling or being blown upon it, or by bursting and flooding it with water, but not a single fact is alleged upon which the apprehension of such danger can be based. In the first count nothing but the apprehension itself is alleged, and in the second and third merely that it (the stand-pipe) is liable to fall, blow over, or burst. Why the apprehension exists, or why it is liable to fall, etc., is left wholly to conjecture. It certainly will not be contended that the manner in which it is constructed, as shown by the declaration, necessarily renders it dangerous. No one will deny that such a structure could be rendered reasonably secure by proper stays and braces, though it might not be so without. True, as in the instances referred to by counsel for appellee, water-towers and stand-pipes have fallen or been destroyed; but the same is true of buildings of every kind—perhaps of all superstructures. If this one is liable to fall, blow down, or burst, that liability must arise from certain facts, and those facts must be pleaded. Here we have nothing but the mere conclusion of the pleader.

The fourth count avers that "said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting-room in the southwest corner," etc. We are unable to see why this is not a sufficient allegation of

special injury to plaintiff's property to entitle her to recover: *Rigney v. City of Chicago*, 102 Ill. 80. The extent of the injury is a question of fact, to be determined upon plea and trial.

We think the circuit court erred in sustaining the demurrer to the fourth count.

Judgment reversed.

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**MUNICIPAL CORPORATIONS—STREETS—LICENSE TO OBSTRUCT.**—Municipal authorities have the power to authorize and render lawful obstructions and erections in the streets for a public purpose, which would otherwise be deemed nuisances, on the ground that this is merely putting the street to a new and improved use demanded by the necessities of the times and modern conveniences and appliances: *Savage v. City of Salem*, 23 Or. 381; 37 Am. St. Rep. 688, and note, with the cases collected.

**MUNICIPAL CORPORATIONS.—RIGHT TO GRANT USE OF STREETS TO RAILWAYS:** See *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610; 37 Am. St. Rep. 639, and note; *Evans v. Chicago etc. Ry. Co.*, 86 Wis. 597; 39 Am. St. Rep. 908, and note; *Ligare v. Chicago*, 139 Ill. 46; 32 Am. St. Rep. 179, and note. And see particularly the extended note to *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 612.

**REAL PROPERTY—DAMNUM ABSQUE INJURIA.**—There are many cases in which the lawful use of one's property causes injury to adjacent property for which there is no remedy, because no right of the adjacent owner is invaded: *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267; 37 Am. St. Rep. 552; *Gregory v. Layton*, 36 S. C. 93; 31 Am. St. Rep. 857, and note, with the cases collected.

**ACTION BY PRIVATE PERSON FOR OBSTRUCTION OF HIGHWAY:** See the note to *Jackson v. Kiel*, 16 Am. St. Rep. 209.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**INDIANA.**

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**CARR v. STATE.**

[125 INDIANA, 1.]

**CRIMINAL LAW—EVIDENCE OF REPUTATION FOR PEACE AND QUIETUDE.—**

Evidence of the general reputation of the accused for peace and quietude is admissible in a prosecution for murder, though committed by poisoning.

*F. T. Hord, L. Perkins, and W. H. H. Miller, for the appellant.*

*A. G. Smith, attorney general, J. W. Holsman, and J. M. Leathers, for the state.*

<sup>1</sup> HACKNEY, J. In the court below the appellant was tried, convicted, and sentenced to a life imprisonment <sup>2</sup> upon an indictment charging her with the crime of murder in the first degree, in the killing of her child, Conwell Carr, by administering to him a deadly poison. In the course of the trial, and as a part of her defense, it was proposed to prove, by a competent witness, that her character and reputation for peace and quietude were good. Upon the objection of the prosecutor, the evidence was excluded by the court upon the expressed ground that such trait of character was not involved in the offense charged.

The questions by which such evidence was sought were informal, but, as the objection was sustained with express reference to the subject matter, and as objection is not made here as to the form of such questions, we will determine the correctness of the ruling as made.

In *Hall v. State*, 132 Ind. 317, this court passed upon the



point here in issue. It is there said: "The appellant offered to prove his general reputation for peace and quietude, and the court excluded it. In this the court committed an error. Evidence of the general reputation of the accused for peace and quietude is permissible in a prosecution for murder, though the murder may have been committed by poisoning."

In *Warner v. State*, 114 Ind. 137, this court held that an assault is a constituent element of the crime of murder.

In *Commonwealth v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350, the court says: "Although force and violence are included in all definitions of assault, or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts," citing 3 Chitty on Criminal Law, 799; 1 Gabbett's Criminal Law, 82; Rose's Criminal Evidence, 8th ed., 296; 3 Blackstone's Commentaries, 120, and notes, and 2 Greenleaf on Evidence, sec. 84.

It is there further said: "If one should hand an explosive substance to another, and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault. . . . It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force": *Regina v. Button*, 8 Car. & P. 660.

The contrary is not suggested, but it is practically conceded, as it must be, that the character for peace is involved in the offense of an assault or an assault and battery. This being true, and having reached the conclusion that an assault is involved in the unlawful infliction of an injury by administering poison, the action of the court in refusing the offered evidence was erroneous.

The judgment of the criminal court is reversed, with instructions to sustain the appellant's motion for a new trial.

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**HOMICIDE—EVIDENCE—GOOD CHARACTER OF ACCUSED.**—A person on trial for murder is permitted to prove his good character for peace in the neighborhood where he resides: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96.

The character of a prisoner for peaceful habits and disposition is competent proof for him: *Dupres v. State*, 33 Ala. 380; 73 Am. Dec. 422, and note. Proof of the good character of the accused is admissible in all criminal cases, not only where doubt exists on the other proof, but also to generate a doubt: *Springfield v. State*, 96 Ala. 81; 38 Am. St. Rep. 85, and note; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, and note. On the trial of a prisoner for murder, where the fact of the killing is proved, it is inadmissible to show the character of the accused for peace or violence, but his general character, without reference to particular facts, may be shown; evidence of good character in relation to the crime charged, it seems, is admissible only in cases where the guilt of the party accused is doubtful: *McDaniel v. State*, 8 Smedes & M. 401; 47 Am. Dec. 93. Evidence as to temperament, disposition, and condition of the mind of the defendant is not admissible on the trial of an indictment for murder where insanity at the time of the homicide is not set up as a plea: *Jacobs v. Commonwealth*, 121 Pa. St. 586; 6 Am. St. Rep. 802, and note. See the note to *Fields v. State*, 11 Am. Rep. 776.

## HENDERSON v. LONDON AND LANCASHIRE INS. CO.

[185 INDIANA, 23.]

**CONSTITUTIONAL LAW—TITLE OF STATUTE.**—If the subject matter of a statute is composed of two or more essential elements, one only of which is expressed in its title, it is insufficient under a constitutional requirement that "every act shall embrace but one subject and matters properly connected, which subject shall be expressed in the title." Thus, when one of the objects of the subject matter of an act is to collect funds from foreign insurance companies, and another object is to dispose of such funds for the relief of firemen, the expression of one only of such objects in the title of the act renders the statute void.

**CONSTITUTIONAL LAW—EQUAL AND UNIFORM TAXATION.**—A statute having for its objects the collection of funds from foreign insurance companies by taxation, and the disposition of such funds for the relief of firemen, in cities having paid fire departments, is unconstitutional, as not being a uniform and equal rate of taxation, and as applying to a portion of a class only.

**PUBLIC OFFICERS—FIREMEN—TAXATION FOR BENEFIT OF.**—Firemen are not servants of the state, nor of a county, but of the municipality in which they serve, and the taxing power of the state cannot be exerted for their benefit upon only a portion of a class of the citizens of the state.

**CONSTITUTIONAL LAW—EQUAL AND UNIFORM TAXATION.**—The taxing power of the state cannot be made the means of levying municipal taxes upon a portion of a class of citizens, and of bestowing the tax so levied upon a small fraction of the citizens of the state.

**STATE TAXATION IS NOT OF UNIFORM AND EQUAL RATE** when applied to a portion only of a class of citizens, omitting a fraction of the same class, although such class is divided by county lines. The same rate of taxation must apply alike to all in any given taxing district.

*A. G. Smith, attorney general, F. M. Finch, J. A. Finch, J. S. Duncan, and C. W. Smith, for the appellant.*

*J. W. Kern and T. Bates, for the appellee.*

<sup>24</sup> HACKNEY, J. The appellee brought this action in the lower court to enjoin the appellant, as auditor of state, from revoking, or attempting to revoke, the license or authority of the appellee, as a foreign insurance company, to do business in the state of Indiana.

The petition alleged that the appellee was, and for a number of years had been, engaged in business in the counties of this state; that since the third day of March, 1877, it had fully complied with the act of the general assembly, in force from that date (Rev. Stats. 1881, sec. 3765), alleging in detail the steps taken in compliance with said act, and in otherwise obeying the laws of the state relating to the transaction of its business in this state; that it now holds, and ever since the third day of March, 1877, it has held, proper certificates of authority from said auditor to transact business in the various counties of this state, as a foreign insurance company; that said auditor is threatening to, and will, if not restrained, revoke the authority so held by said company, said auditor therein acting under the act of the general assembly, approved March 9, 1891, for the creation of a fireman's pension fund, etc: Acts 1891, p. 415.

It is not alleged that said company complied with, or attempted to comply with, said act of March 9, 1891, in reporting its business done in Marion county, but it is alleged that said act is, as to foreign insurance companies, unconstitutional, and confers no legal power to revoke the authority of such companies to transact business within this state.

The superior court, in special term, overruled the appellant's demurrer to the petition, and, upon exception to said ruling, the judgment was affirmed by said court in general term. The error assigned in this court is said ruling of the superior court in general term.

The title and first three sections of the act of March <sup>25</sup> 9, 1891, the act the constitutionality of which is here questioned, are as follows:

"An act to create a fireman's pension fund, for the pensioning of disabled firemen, and the widows and the dependent children, mothers, and fathers of deceased firemen, to create a board of trustees of such fund, to authorize the re-

tirement from service of disabled members, and of all members after a service of twenty-five years, and pensioning of such members, and for other purposes in connection therewith in cities in this state having paid fire departments, and declaring an emergency.

"SECTION 1. *Be it enacted by the general assembly of the state of Indiana*, That every fire insurance company doing business in this state, and not organized under the laws of this state, shall, in the months of January and July of each year, report to the auditor of each county in the state wherein there is a city having a fire department paid by said city, under oath of the president and secretary of such company, the gross amount of all receipts received by such company on account of insurance premiums for insurance upon property in said county for the six months preceding the last day of the last preceding December and June, and of the losses actually paid during the same period, and shall, at the time of making such report, pay into the county treasury of such county one dollar on every one hundred dollars of the excess of said receipts over and above said losses. Any fire insurance company which shall fail or refuse to render an accurate account of its receipts and losses, as herein provided, or to pay the required tax thereon into the county treasury, shall forfeit, for the benefit of said fund in said county, one hundred dollars for each day such report or payment shall be delayed, to be recovered in an action in the name of the state of Indiana <sup>26</sup> on the relation of the auditor of said county, in any court of competent jurisdiction; and in case of such failure or refusal of any such fire insurance company to make report or payments as herein provided, it shall be the duty of such county auditor, within ten days thereafter, to report such failure and refusal to the auditor of state, who shall, upon the receipt of such notice, forthwith revoke all authority or license heretofore granted to such defaulting insurance company to do business in this state; and no further authority or license to do business in this state shall be granted or issued to such insurance company, until the county auditor aforesaid shall have certified to the auditor of state that such insurance company has fully complied with the provisions of this act.

"SEC. 2. Any county auditor knowing that any fire insurance company is doing business in any city in said county having a fire department paid by said city contrary to the provisions of this act, who shall fail for ten days after knowl-

edge thereof to report such fact to the auditor of state, shall forfeit and pay for the firemen's pension fund in said county, for each day's failure after the expiration of said ten days, the sum of twenty-five dollars, to be recovered in an action brought in any court of competent jurisdiction by the board of trustees of the fire department of such city.

"And if the auditor of state, after receiving notice from the county auditor of any county that any fire insurance company is doing business in such county contrary to the provisions of this act, shall fail or refuse forthwith to revoke the authority or license of such company to do business in this state, such auditor of state shall forfeit and pay for the benefit of the firemen's pension fund in said county the sum of fifty dollars for each day's failure, the same to be recovered in an action <sup>27</sup> brought by said county auditor in any court of competent jurisdiction in Marion county.

"SEC. 3. The sum so paid into the county treasury of each county, as provided in section 1 of this act, shall be set apart and designated as a 'Firemen's Pension Fund,' and the same shall be held and disbursed for the purposes and objects and in the manner provided for in this act."

The remaining sections of the act provide for the election, service, and duties of trustees for such pension fund, the manner of distributing and controlling such fund by such trustees, and that the act shall not be so construed as to affect existing legislation requiring insurance companies to pay taxes into the treasury of the state.

The first objection to the act is that it violates section 19, article 4, of the state constitution, which is as follows: "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But, if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

It is important to ascertain the full scope and meaning of this provision of the constitution, and, as has often been said by this court, one obvious purpose was to limit an act to one subject and matters properly connected therewith; another purpose was that such subject—not the matters connected therewith—should be expressed in the title, and still another purpose was to limit the invalidity, by reason of any failure to so express the subject in the title, to so much of the sub-

ject as might not be so expressed. But can we say that these were the only purposes?

In *Grubbs v. State*, 24 Ind. 295, it was declared that the provision was designed to prevent mischief in legislation,<sup>28</sup> which had prevailed before its adoption. Said Justice Fraser: "One of them was stated to be the enactment of laws under false and delusive titles, whereby measures had procured the support of legislators, who were thus deceived as to the character of the laws; and another was deemed to be the conjunction, in one act, of two or more subjects having no legal connection, for the purpose of procuring the passage of laws which might not alone command legislative sanction, upon the strength of popular measures embraced in the same act."

Judge Cooley, in his work on Constitutional Limitations, sixth edition, page 171, in speaking of the purpose of this provision in the constitutions of the states, says: "It may therefore be assumed as settled that the purpose of these provisions was: 1. To prevent hodge-podge or 'log-rolling' legislation; 2. To prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and 3. To fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon, by petition or otherwise, if they shall so desire": See, also, *In re Road etc. of Phoenixville*, 109 Pa. St. 44.

At a time when the constitution was fresh from the hands of its framers this court held that one of the objects of this provision was to promote the codification of the enactments of the legislature: *Indiana Cent. Ry. Co. v. Potts*, 7 Ind. 681.

We could multiply the desired ends and laudable objects of this provision as expressed by the courts, but we<sup>29</sup> deem those already stated as sufficient for the proper determination of the question under consideration.

Counsel for the parties have cited many cases where acts covering very many subjects have been construed. Some of these manifest the spirit of liberality in construing statutes with reference to this provision, while others look more closely to the letter of the provision. It is observed, however, that, owing to the diversity of the subjects legislated upon, and the varied forms of expressing those subjects, precedents are without assistance further than as they apply general rules.

In construing the enactments of the legislature, with reference to their form under the constitution, we are fully impressed with the importance, as well as the delicacy, of our task. Due respect for the rights, privileges, and powers of the legislative department of the state government, and a proper regard for the direction of the fundamental laws, make it our duty to uphold legislation, where it is not clear that the constitutional command has been violated or neglected, and, where it has clearly been violated or neglected, to so decide without regard to the objects sought or the interests involved in such legislation.

To properly apply the rules suggested for our guidance we should first ascertain the subject of the act in question.

From the sections of the act as quoted above it will be seen that the object was to make a certain class of firemen pensioners upon a certain class of insurance companies, and to provide and direct the instrumentalities through which this end should be accomplished. We realize that exception may be taken to this statement of the object, since it is contended that the act is not only an exercise of the taxing power, but is in a sense one of the penal conditions upon which such companies are <sup>so</sup> permitted to do business in the state. Of this contention we will speak hereafter. That we give correctly the object of the act is supported by the further contention that such insurance companies have an interest in the preservation of the property insured, which interest is advanced by the maintenance of a wise, diligent, and faithful service of the fire companies, and that they owe some duty in maintaining such service. It is in this line that the act finds its chief support as a just measure.

It will be found difficult, if not impossible, to discriminate between a statement of the object of this act and a statement of its subject. This may not be true, as a general rule, with enactments, but we find it so in this instance. Possibly, it may not be necessary in expressing the subject of this act, in order to comply with the constitutional provision, that the instrumentalities through which the end is accomplished should be stated as a part of the subject, but, to our mind, it is clear that the subject cannot be less than the object in other respects, as we have stated it. "An act concerning pensions" would have been a general statement of the subject of the act, but it would have been too general to advise any one intelligently of its character. Being an expression of the



legislature, one of whose functions is to deal with public revenues, it would be supposed that pensions were to be provided from such revenues, but suppositions are not to be indulged, when the legislature is directed to express the subject—certainly with enough particularity that, at least, one accustomed to reading such expressions might understand something of its objects and effects.

It should be more than a mere warning to the reader that unless he shall read the act and learn if his interests are involved his property may be affected by it.

Ordronaux's Constitutional Legislation states, page 590, that "titles should distinctly recite what the particular subject of the law is." This may often be done by language quite general; then, again, there are instances which require particularity. If the subject is composed of two or more essential elements, the expression of one of such elements in the title would not suffice. The absence of one of such elements in the title would be as misleading, and might be as pernicious, as the evils sought to be obstructed by the constitution. The subject of this act, as we have indicated, is to gather funds from foreign insurance companies and to dispose of such funds for the relief of firemen. The title expresses the first of these objects included within the subject, but wholly omits the other of such objects.

In *State v Young*, 47 Ind. 150, a test was prescribed for determining if the subject is expressed in the title. It was said, in speaking of that element of the subject claimed to be absent from the title: "Suppose that there was no other provision in the act. . . . If the section could not thus stand alone under the title it must fall." We apprehend that this is always true where only a part of the subject is expressed, and that it is especially true where that part of the subject omitted from the title is not naturally or ordinarily connected with that part of the subject which is expressed in the title.

Omitting that part of the act relative to the bestowal of such fund upon firemen, the provision requiring such companies to contribute to such fund could not stand alone, under the title of the act, as the subject is expressed. The requirement that the subject expressed should apprise the people of the subject of legislation, in order that an opportunity for a hearing or for petition may be had, is far from being complied with in the act before us. No notice whatever to those expected to contribute <sup>22</sup> to such fund is given. It may be

said that other taxing acts have been held valid without expressing in the title the classes affected by them, but we think this will not be found true where the source is not general, and in the exercise of the natural and ordinary powers of taxation. Here we have an unusual and extraordinary exercise of the power, not only in the object or purpose, but in the source from which the fund is to be raised, and in the manner of levying it.

The act under consideration is attacked as violating several other provisions of the constitutions of the United States and of the state of Indiana, but we do not deem it our duty to determine but one of the questions so presented, having already held the act insufficient as to its title.

It is said that the act is an attempted exercise by the legislature of the power of taxation, and that, being local, not uniform, and for no public purpose, is in violation of the taxing power as conferred by the constitution, article 10, section 1. That provision of the constitution is as follows: "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

Is the enactment of the law before us an attempted exercise of the power of taxation as conferred by the constitution?

In several states this character of legislation has been before the courts for construction, and we find the decided weight of authority holding that it is such an attempt: *San Francisco v. Liverpool* <sup>22</sup> *etc. Ins. Co.*, 74 Cal. 113; 5 Am. St. Rep. 425; *State v. Wheeler*, 33 Neb. 563; *Philadelphia Assn. etc. v. Wood*, 39 Pa. St. 73; *State v. Merchants' Ins. Co.*, 12 Ia. Ann. 802.

The only cases holding it as the exercise of any other power are *Trustees etc. v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217, where it is expressly held that such power is in the exaction of a license fee, or the fixing terms upon which such companies may transact business in the state; and *Fire Department of Milwaukee v. Helfenstein*, 16 Wis. 136, where it is expressly held that the power exercised is "the police power inherent in the sovereignty of the state." Another case, that of the *Firemen's Benevolent Assn. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115, stands alone in declaring it is not only the

taxing power, but that such power was correctly exercised, under the peculiar form of the constitution of that state.

We are not called upon to decide whether the legislature might properly have required the exaction here levied, as a condition upon which such companies could do business in this state, as it was held in New York, but we are of the opinion that no such attempt was made. Since March, 1877, as we have shown, our legislation has prescribed the terms upon which such companies may transact business in this state (Rev. Stats. 1881, sec. 3765), and, as alleged in the complaint, this appellee, during that period, has fully complied with such terms. The act in question does not purport to add its exaction to the conditions so prescribed by the act of 1877; on the contrary, it expressly denominates the levy a "tax."

If there were room for question as to the correctness of our conclusion we should find support from the concession of appellant's able counsel, that it must be treated as an effort to exercise the taxing power.

Counsel for appellant further say: "Of course, we <sup>24</sup> concede that the legislature cannot levy taxes for any thing but public purposes, as, for instance, to assist a private person in his business, or even to aid him in misfortunes from fire, or flood, or other casualty." But it is insisted that the declared burden is for a public purpose, in that it is levied for the benefit and compensation of those, and the families of those, whose lives have been or may be imperiled or lost in pursuing the arduous and dangerous duties of saving from the flames the property of the citizens; that in the discharge of these duties the firemen sustain such relation to the public as to become, in the true sense, public servants; that the public demands the highest degree of skill, diligence, and good faith from these servants, and that this degree is best attained by holding out to them the certainty of care when injured, and family support when age, disease, or death comes upon them. To establish this contention, counsel devote considerable space in their briefs to quotations from text-writers and from adjudged cases, principally the cases we have referred to as not adhering to the proposition that this exaction is a tax, and they exhibit marked ability in building the theory so urged upon us. To this theory we are not inclined to give our adherence. The Wisconsin rule does not hold that the right exists in behalf of firemen as public servants. It disregards the relationship existing between fire-

men and the public, and justifies the exaction as the exercise of a police power, and in imposing the burden upon foreign companies as the condition upon which they are admitted to do business in the state.

The Illinois rule can best be given by quoting from *Firemen's Benevolent Assn. v. Lounsbury*, 21 Ill. 513, 74 Am. Dec. 115. It is there said: "The other objection is that here a revenue is attempted to be raised, not for state purposes, nor yet to meet any public exigency or want, but purely <sup>as</sup> for the benefit of a private charity. That it is not required to be paid into the state treasury, but must be paid to this private corporation, for whose benefit the burden is imposed. The general grant of legislative power found in the constitution confers upon the general assembly all legislative power, and authorizes the lawmakers to pass any laws and do any acts which are embraced in the broad and general word 'legislation,' as known and defined in the English language. It authorizes the passage of any law which could be enacted in the most despotic government. It even authorizes every thing which the people could enact in their primary capacity. Any thing which they would have a right to embody in the constitution itself."

It is further stated: "There is nothing to be found in the constitution which can be held to inhibit the legislature from imposing burdens or raising money from citizens of the state which is not for the direct benefit of the state, and is never designed to belong to the state."

The only reference made to the relationship between firemen and the public is as follows: "With the view we take of this case it is immaterial whether this be considered a public or a private charity. But it should more properly be considered a public charity."

Our constitution gives no such unlimited power to the legislature, and, as an authority for the construction of powers under our constitution, we cannot accept this decision. Nor are we inclined to give special weight to it in favor of the contention of the appellant that firemen are public servants within that sense which would admit of the exercise of the taxing power of the state. The New York rule is that the percentage of receipts is exacted as a condition upon which companies are admitted to transact business in the state, as the terms of such <sup>as</sup> admission, or the license fee for such privilege. This is not in the exercise of the taxing power,

but, so far as it may be recognized as prescribing the terms upon which foreign corporations are admitted into the state, it is unimportant whether firemen are public servants or not. When it is held that legislation is for the purpose of defining the terms of admission there is in this state no question of its constitutionality. Therefore, the New York rule involves the question whether firemen are public servants only as to the distribution of a fund conceded to be raised by proper methods, namely, as the condition of admission into the state.

Such is not the whole question with which we are dealing. Here we have a law enacted in the pretended exercise of the taxing power of the state, exacting a penalty from that part of the class of foreign insurance companies which do business in the four counties of this state having cities with paid fire departments, and the fund thus exacted by the power of the state is not for the benefit of the state, is not for the benefit of those portions of the state whose business with such companies must contribute to said fund.

The business done in each of the four counties affected bears the burden of the exaction, and the fund is devoted to the benefit of firemen within four cities only. The property of such counties outside of such cities get no protection from such firemen, and its owners have no pecuniary interest in them. While the fund for the benefit of the city is obtained from the companies, the companies must first obtain it from the whole people of the county, thus requiring the people of the county, indirectly, to contribute to the pensioning of city firemen. The question, therefore, should be, Are the firemen benefited the servants of those whose taxing powers are exerted in their behalf? We think they are not, even if <sup>27</sup> we should concede that they were in any sense servants, or dependent upon the bounty, or were the objects of the charity of the people of such cities. It must be borne in mind that they are not the servants of the state; they are not the servants of the county in which they live. Though they may deserve the highest praise and the most liberal rewards for their daring and hardships in combating the flames, they are the creatures and the servants of but a small subdivision of the state.

Here the taxing power of the state is exerted for the benefit of a few of the citizens of the state, who hold the obligation of their respective cities for their courage and their valued service, and the purpose is that this power shall be exerted

for the discharge of that obligation. We do not regard this as the most objectionable feature of this act. We have ninety-two counties in this state, whose united power is thus exerted in levying a tax upon certain foreign insurance companies. As to the state, all foreign insurance companies constitute a class, and of this class all are not subject to the operation of this act; only those who do business in four of such counties. The taxing power of the state cannot thus be made the means of levying municipal taxes upon a fraction of a class, and of bestowing the tax so levied upon a small fraction of the citizens of the state—all of her citizens standing in like relation to her, unless she owes them some peculiar obligation not existing in serving as firemen for some city. The taxing district of the state, wherein taxes are directed for the benefit of those serving the state, is the whole state. State taxes are not of uniform and equal rate when they apply to a portion of a class only and omit a portion of the same class, and this is no less true because the classes may be divided by county lines.

Uniformity in rate, as required by the constitution, <sup>28</sup> means that the same rate shall apply alike to all in any given taxing district: *Cleveland etc. Ry. Co. v. Backus*, 133 Ind. 513; *Gilson v. Board of Commrs.*, 128 Ind. 65.

The four counties affected have no power, under this act, to make the percentage from the business of the companies the condition upon which business shall be done by such companies, and the act does not purport to give such power; the percentage is not levied under any law or by any method known to the gathering of county or city revenues. The act is a plain and unmistakable effort to use the taxing power given to the state, and for the purposes of the state in behalf of a favored class in a few of the cities of the state. As we have said, this cannot be done.

The cases of *San Francisco v. Liverpool etc. Ins. Co.*, 74 Cal. 113; 5 Am. St. Rep. 425; *State v. Wheeler*, 38 Neb. 568; *Philadelphia Assn. etc. v. Wood*, 39 Pa. St. 73; *State v. Merchants' Ins. Co.*, 12 La. Ann. 802, fully sustain our conclusion.

The judgment of the lower court is affirmed.

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STATUTES.—SUBJECT EXPRESSED IN TITLE: See *Finnegan v. Nærenberg*, 52 Minn. 239; 38 Am. St. Rep. 552, and note; and *State v. Harrub*, 95 Ala. 176; 36 Am. St. Rep. 195, and note, with the cases collected.

STATUTES.—TITLE CONTAINING MORE THAN ONE SUBJECT: See *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878, and note; and the extended note to *Davis v. State*, 61 Am. Dec. 337.

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for the discharge of that obligation. We do not regard this as the most objectionable feature of this act. We have ninety-two counties in this state, whose united power is thus exerted in levying a tax upon certain foreign insurance companies. As to the state, all foreign insurance companies constitute a class, and of this class all are not subject to the operation of this act; only those who do business in four of such counties. The taxing power of the state cannot thus be made the means of levying municipal taxes upon a fraction of a class, and of bestowing the tax so levied upon a small fraction of the citizens of the state—all of her citizens standing in like relation to her, unless she owes them some peculiar obligation not existing in serving as firemen for some city. The taxing district of the state, wherein taxes are directed for the benefit of those serving the state, is the whole state. State taxes are not of uniform and equal rate when they apply to a portion of a class only and omit a portion of the same class, and this is no less true because the classes may be divided by county lines.

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**TAXATION MUST BE GENERAL AND UNIFORM:** *Lexington v. McQuillen*, 9 Dana, 513; 35 Am. Dec. 159; *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Andrews v. King County*, 1 Wash. 46; 22 Am. St. Rep. 136; *Hutchinson v. Oark Land Co.*, 57 Ark. 554; 38 Am. St. Rep. 258, and note. See, also, the extended notes to *State v. Hinman*, 23 Am. St. Rep. 26; and *New Orleans v. Great Southern Telephone etc. Co.*, 8 Am. St. Rep. 510.

## THORNBURG v. WIGGINS.

[185 INDIANA, 178.]

**TENANCY BY ENTIRETIES—HUSBAND AND WIFE.**—Tenancy by entireties is to be presumed when the grantees are husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended.

**JOINT TENANCY.**—HUSBAND AND WIFE may take real estate as joint tenants or as tenants in common, if the instruments creating the title use apt words for the purpose.

**JOINT TENANCY—HUSBAND AND WIFE—EXECUTION.**—A grant of land to husband and wife "in joint tenancy" makes them joint tenants, and not tenants by entireties therein, and the interest of each is subject to execution.

*W. A. Thompson, A. O. Marsh, and J. W. Thompson*, for the appellants.

*E. L. Watson, J. E. Watson, and J. S. Engle*, for the appellees.

179 DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate, which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the twenty-fourth "day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of four hundred and three dollars and seventy cents and costs, against one John T. Bur-

roughs, and the appellee, Daniel S. Wiggins, as partners, doing business under the firm name of Burroughs and Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment and placed in the hands of the appellant, Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the twenty-fifth day of May, 1886, levy said execution, on said real estate, or on the one-half interest in value thereof, taken as the property of said appellant, Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded by the direction of said Howard and Gaston to advertise said real estate for sale under said execution and levy to make said debt, and did, on the eighth day of June, advertise the same for sale on the third day of July, 1886, and will, on said day, sell the same, unless restrained and enjoined <sup>189</sup> from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellee's title," etc.

The second paragraph is the same as the first, in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties.

The granting clause of the deed is as follows: "This indenture witnesseth, that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc.

Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers.

Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits, but, upon the death of one, his share vests in the survivor or survivors

until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, for years, or even in remainder. But the estate held by <sup>1881</sup> each tenant must be alike. Joint tenancy may be destroyed by any thing which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise, except by the instrument providing for such tenancy: *Griffin v. Lynch*, 16 Ind. 396.

The ninth volume of the American and English Encyclopedia of Law, page 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally . . . they take as one person, they take but one estate as a corporation would take. In the case of realty, they are seised not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seised of the whole, and each being seised of the entirety, they are called tenants by the entirety, and the estate is an estate of entireties. . . . Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole, the estate is inseverable—cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole."

This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called estates by entirety." As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law: *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471.

Strictly speaking, estates by entireties are not joint tenancies: *Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; the husband and wife being seised not of moieties, but both seised of the entirety *per tout*, and not *per my*: *Jones v. Chandler*, 40 Ind. 588; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471; *Arnold v. Arnold*, 30 Ind. 305.

It has been said by this court in some of the earlier <sup>1883</sup> decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants by the entirety. It is not even necessary that they be described as such or their marital

relation referred to: *Morrison v. Seybold*, 92 Ind. 298; *Hadlock v. Gray*, 104 Ind. 596; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; *Chandler v. Cheney*, 37 Ind. 391.

But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance, which clearly indicate the creation of a different estate: *Hadlock v. Gray*, 104 Ind. 596; *Edwards v. Beall*, 75 Ind. 401.

Having its origin in the fiction or common-law unity of husband and wife, the courts of some states have held that married women's acts, extending their rights, destroyed estates by entirety, but this court holds otherwise: *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210. And the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate: *Jones v. Chandler*, 40 Ind. 588; *Morrison v. Seybold*, 92 Ind. 298. There can be no partition: *Chandler v. Cheney*, 37 Ind. 391. A mortgage executed by the husband alone is void: *Jones v. Chandler*, 40 Ind. 588. And the same is true of a mortgage executed by both to secure a debt of the husband: *Dodge v. Kinzy*, 101 Ind. 102. And the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it: *State v. Kennett*, 114 Ind. 160. A judgment against one of them is no lien upon it: *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247; *McConnell v. Martin*, 52 Ind. 434; *Othwein v. Thomas* (Ill., Sept., 1887), 13 N. E. Rep. 564.

<sup>183</sup> Upon the death of one, the survivor takes the whole in fee: *Arnold v. Arnold*, 30 Ind. 805. The deceased leaves no estate to pay debts: *Simpson v. Pearson*, 31 Ind. 1; 99 Am. Dec. 577. And during their joint lives there can be no sale of any part on execution against either: *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, 57 Ind. 412; 26 Am. Rep. 64; *Chandler v. Cheney*, 37 Ind. 391; *Davis v. Clark*, 26 Ind. 424; 89 Am. Dec. 471; *McConnell v. Martin*, 52 Ind. 434; *Cox v. Wood*, 20 Ind. 54.

The statutes extending the rights of married women have no effect whatever upon estates by entirety: *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent: *Enyeart v. Kepler*, 118 Ind. 84; 10 Am. St. Rep. 94.

The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property, with us, for eighty-six years.

Section 2922 of the Revised Statutes of 1881 provides that "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy."

Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife.

<sup>184</sup> Under a statute of the state of Michigan, similar in all its essential qualities to our own, the court held that "Where lands are conveyed in fee to husband and wife they do not take as tenants in common": *Fisher v. Provin*, 25 Mich. 347. They take by entireties; whatever would defeat the title of one would defeat the title of the other: *Manwaring v. Powell*, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest, neither can be said to own an undivided half: *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Allen v. Allen*, 47 Mich. 74.

While the rule of entireties was predicated upon a fiction, the legislative intent, in this state, has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women: *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210.

"Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule was founded. Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. It is evident that the legislature of 1881 did not intend to repeal

the statutes establishing tenancies by entireties. They simply intended to enlarge, in some particulars, the separate power of the wife, which existed already under the acts of 1852 and the year following. . . . 'It did not <sup>185</sup> abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as joint tenants or tenants in common': *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210.

In *Chandler v. Cheney*, 37 Ind. 391, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted."

The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended.

Where a contrary intention is clearly expressed in the deed, a different rule obtains.

"A husband and wife may take real estate as joint tenants or tenants in common if the instrument creating the title use apt words for the purpose": 1 Preston on Estates, 132; 2 Blackstone's Commentaries, Sharswood's note; 4 Kent's Commentaries, side p. 363; 1 Bishop on Married Women; Freeman on Cotenancy, sec. 72; *Fladung v. Rose*, 58 Md. 13 (24).

"And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common": Stewart on Husband and Wife, secs. 307-10; Tiedeman on Real Property, sec. 244.

"And as by common law it was competent to make husband and wife tenants in common by proper words <sup>186</sup> in the deed or devise," etc.: *Hoffman v. Stigers*, 28 Iowa, 310; *Brown v. Brown*, 133 Ind. 476.

"So it seems that husband and wife may, by express words, be made tenants in common by gift to them during coverture": *McDermott v. French*, 15 N. J. Eq. 80.

In *Hadlock v. Gray*, 104 Ind. 596 (599), a conveyance had been made to Isaac Cannon and Mary Cannon, who were



husband and wife, during their natural lives, and the court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. This result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. . . . The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife."

The court further says: "It is true that where real property is conveyed to husband and wife jointly and there are no limiting words in the deed, they will take the estate as tenants in entirety. . . . But while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property, which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife."

<sup>187</sup> The court then adopts the language of Washburn, *supra*, and Tiedeman, *supra*.

In *Edwards v. Beall*, 75 Ind. 401, the court hold that when lands are granted husband and wife, as tenants in common, they will hold by moieties, as other distinct and individual persons would do.

If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants. Because, by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties—joint tenancy would be superseded or put in abeyance by the estate created by law tenancy, by entirety.

The result of such reasoning would be to destroy the contractual power of the parties where this relationship between

the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy, or in common, if appropriate language be expressed in the deed or will creating it, and we know of no more apt terms to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy."

These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold not by entireties, but in joint tenancy. A joint <sup>188</sup> tenant's interest in property is subject to execution: Freeman on Executions, 125.

Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

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**HUSBAND AND WIFE—TENANCY BY ENTIRETIES, WHEN EXISTS.**—A tenancy by the entirety is created by a conveyance of land to a husband and wife, which does not state the manner in which they shall hold such land: *Stels v. Shreck*, 128 N. Y. 263; 26 Am. St. Rep. 475, and note; *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430; *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64, and note; *Baker v. Stewart*, 40 Kan. 442; 10 Am. St. Rep. 213, and note; *Enyeart v. Kepler*, 118 Ind. 34; 10 Am. St. Rep. 94, and note.

**HUSBAND AND WIFE—WHEN COTENANTS.**—When it appears from the words of a grant or devise to a husband and wife that the intent was to create a tenancy in common, they take and hold as tenants in common: *Miner v. Brown*, 133 N. Y. 308. If a devise is made to a husband and wife, they take as tenants in common: *Sergeant v. Steinberger*, 2 Ohio, 305; 15 Am. Dec. 553. Since the Married Woman's Act, the right of survivorship has ceased, and, under a deed to a man and wife, they take and hold the estate conveyed as tenants in common: *Mittel v. Karl*, 133 Ill. 65. If a husband and wife contribute equally from their separate estates moneys which they invest in a bond and mortgage taken in their joint names, to be held by them, their representatives, or assigns, they become tenants in common thereof: *Matter of Albrecht*, 136 N. Y. 91; 32 Am. St. Rep. 700; and see, also, the extended note to *Den v. Hardenbergh*, 18 Am. Dec. 384.

**HUSBAND AND WIFE—WHEN JOINT TENANTS.**—At common law, under a conveyance of real estate to a husband and wife, they take as joint tenants or tenants in common only by express words, or words strongly implying such intention: *Baker v. Stewart*, 40 Kan. 442; 10 Am. St. Rep. 213, and extended note. A married woman may take and hold real property as a joint tenant with her husband where, by a deed to herself and her husband, it appears plainly that the intent was to convey to her not merely as a wife, but separately, by virtue of her individual right: *Jooss v. Fey*, 129 N. Y.

17. A conveyance to a man and woman then unmarried vests an estate in them as joint tenants or as tenants in common, and this estate will not be changed by their subsequent marriage: *Den v. Hardenbergh*, 5 Halst. 42; 18 Am. Dec. 371.

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## LAKE ERIE AND WESTERN R. R. Co. v. YOUNG.

[125 INDIANA, 426.]

### INJUNCTION TO PREVENT OVERFLOW OF LANDS—SUFFICIENCY OF COMPLAINT.

An injunction lies to restrain a railroad company from constructing a culvert across a watercourse along its right of way, and from banking up such right of way on each side of the culvert, so that the waters of the stream cannot pass away except through the culvert, if it would be insufficient to carry off the waters of the stream during ordinarily heavy rains, thus causing the waters to be dammed up and to overflow plaintiff's lands, destroying his crops, fences, and other improvements, to his great, continuous, and irreparable injury from year to year.

**INJUNCTION—MODIFICATION OF.**—A temporary injunction may be so modified as to protect the rights of all parties in interest.

*J. W. Lovett, S. M. Keltner, F. S. Foote, and W. E. Hackdorn*, for the appellant.

*E. E. Hendee*, for the appellees.

<sup>427</sup> HOWARD, J. The appellant's railroad extends along its right of way through the lands of appellees, crossing Lilly creek, a natural stream of water, on trestlework about thirty feet high and three hundred and twenty feet long.

Appellant being about to fill up this trestlework with earth, except a space to be occupied by a stone arch or culvert, with an opening twelve feet wide and ten feet and five inches high in the arch, appellees brought suit to enjoin the work, claiming that the arch would be insufficient for the passage of the waters of Lilly creek, and that great, continuous, and irreparable injury would be done appellees by so impeding the flow of the waters.

A temporary restraining order was granted appellees on their petition. A motion to dissolve this order was overruled, as was also a demurrer to the complaint. The appellant answered by way of a plea in confession and avoidance, and also by a general denial. A demurrer to the special paragraph of answer having been overruled, the appellees replied by a general denial. A motion by appellant objecting to the trial of the cause by a jury, or to the submission to a jury of any <sup>428</sup> question of fact involved in the issues, was overruled by the court.

A jury having been impaneled, the court, of its own motion, submitted certain interrogatories to the jury to find the facts for the information of the court. The jury returned their answers to the interrogatories as follows:

"1. Will the culvert constructed by the defendant be sufficient to pass the water during the rainy seasons of the year, in times of ordinarily heavy rainfalls? Ans. No.

"FRANCIS WATKINS, Foreman.

"2. If you say no to question No. 1, state what injury, if any, will be done to the lands of the plaintiffs; state fully the character and extent of such injury. Ans. That, by the further backing up of the water on said lands, the plaintiffs' said lands will be damaged, their fences will be destroyed, and the other improvements upon said real estate will be injured by the water thereon, and their growing crops will be drowned out. Plaintiffs will receive great and irreparable injury, of such as we cannot estimate in dollars and cents, and that the damages thereon will be continuous from year to year.

FRANCIS WATKINS, Foreman."

Pending the finding and decision of the court the restraining order was so modified as to permit the filling up of the trestlework with earth, except that, in addition to the culvert, another opening, not less than fifteen feet in width on the bottom, at the natural level, should be left free of earth.

The court, at the request of the appellant, made its finding of facts and conclusions of law thereon, finding the facts in favor of the appellees, and found, as conclusions of law upon the facts found, that the appellees "are entitled to have the injunction and restraining order hereinbefore granted and modified, made perpetual."

A decree was entered in accordance with the finding.

429 The errors assigned and discussed by counsel have reference to the sufficiency of the complaint, and to the findings of facts and conclusions of law.

The appellant contends that the complaint shows that a right of action had not accrued, and, therefore, that a demurrer to it should have been sustained. We think that counsel have misapprehended the nature of the complaint. This is not an action for damages simply, but a suit for injunction to prevent threatened damages.

The case of *Sherlock v. Louisville etc. Ry. Co.*, 115 Ind. 22, upon which appellant relies, was an action seeking various forms of relief for injury to land, amongst them being dam-

ages for overflow of the land caused by a defective construction of the defendant's railroad bridge. It was said in that case: "That the right of the plaintiff was to have his land free from the overflow, and to recover the damages resulting therefrom; and that the wrong of the railway company was the negligent construction and maintenance of the bridge." And the court held that it was not shown in the answer that the railroad company had a prescriptive right to flood the plaintiff's land, or that he had any knowledge that the bridge would flood the land, or acquiesced in such flooding. It did not, therefore, appear that the action was not brought in good time, and the answer of the company was held bad. In so far as that case has any bearing upon the case before us, we think it is against the contention of the appellant.

The material averments of the complaint, so far as they need be set out here, are: That the defendant is the owner of and operating a railroad which runs over and through plaintiff's lands, where it crosses a natural stream of water known as Lilly creek, along which stream there flows a large amount of water during the <sup>430</sup> seasons of the year when there is the most rainfall; that when said railroad was constructed in 1875, it was built across said stream on said land on trestlework about thirty feet high, the trestles being fifteen feet apart, and extending out on each side of said stream until the entire bridge of trestlework was three hundred and twenty feet long, thus leaving full and free opening for all the water coming down said stream; that the amount of water coming down said stream in times of heavy rainfall, and during the wet seasons of the year, is such that the high-water mark on said trestlework bridge is ten feet above ground, and extends to a width of the entire length of said trestlework, and ranging in depth from five to ten feet, and that it is not, and has not, been unusual for the water during the rainy season to run that high; that the defendant, at the commencement of this suit, had adopted plans for, and commenced to construct, a stone arch culvert for said stream, under said railroad, with an opening twelve feet wide and ten feet five inches high in the arch, and to fill all the space then and now occupied by said trestlework with a bank of earth, so that no opening would remain for the water coming down the stream save and except that of said stone arch culvert; that since the commencement of this suit said culvert has been constructed as aforesaid; that said defendant is now

proceeding to and is about to fill up the intervening space under and along said railroad track where the trestlework now is, with an earth embankment, entirely closing up the passageway for the water, save and except said stone arch culvert; that during the rainy seasons of the year, in the fall, winter, and spring, and during the times of ordinary rainfalls, especially in times of heavy rainfalls, the water flows, and will flow, down said stream in such amounts that said stone arch culvert will be wholly insufficient to carry away said <sup>431</sup> water under said railroad; and by reason of the construction of said culvert and the filling in of the embankment, the water coming down the stream will be impeded in its flow, dammed up, and backed upon the lands of the plaintiffs; that said lands are all farming lands, subject to cultivation in annual crops, and to pasture, and as such are used by plaintiffs, and that there are situated on said lands fences and other improvements necessary in the use and occupancy of said real estate; that, by the backing up of the water as aforesaid on said lands, the plaintiffs' said lands will be damaged, their fences will be destroyed, and other improvements upon said real estate will be injured by the waters thereon, and their growing and annual crops will be drowned out, injured, and prevented from growing, and their grass lands thereon will be wholly unfit for use; and by reason of the facts aforesaid the plaintiffs will receive great and irreparable injury, of such character as cannot be estimated and measured in money damages, and that the damage will be continuous from year to year, and that plaintiffs would be compelled, in order to recover from defendant compensation for the damage thus sustained, to bring numerous suits against defendant.

We think this complaint was sufficient for the restraining order prayed for to prevent the threatened injury.

In High on Injunctions, section 12, it is laid down as a general rule that whenever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, a court of equity may properly interpose and afford relief by injunction.

In section 23, of the same work, the author says that the appropriate function of the writ of injunction is to afford preventive relief only, and not to correct injuries <sup>432</sup> which have already been committed. It is for the prevention of a

future injury actually threatened, and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages.

In the case of the *Mohawk Bridge Co. v. Utica etc. R. R. Co.*, 6 Paige, 554, Chancellor Walworth said: "If the magnitude of the injury to be dreaded is great, and the risk so imminent that no prudent person would think of incurring it, the court will not refuse its aid for the protection of the complainant's rights by injunction, on the ground that there is a bare possibility that the anticipated injury from the noxious erection may not happen."

The erection of a milldam, as said in *High on Injunctions*, section 839, in such a manner that the inundation caused by the back flowage of the water lessens the value of complainant's land, destroys his timber, and imperils the health of the neighborhood, will be enjoined.

In *Stone v. Roscommon Lumber Co.*, 59 Mich. 24, it was held that injunction would lie to prevent the flooding of the plaintiff's land, if it appeared that the threatened injury were of a character to render the property comparatively worthless for the purposes to which it was best adapted, and for which it was intended by the owner without regard to the amount of the immediate damage sustained; that the fact that annual freshets in some degree impeded the growth of hay on the land would not relieve the defendant from liability for erecting a dam in such a manner as to flood such land, thereby destroying its value for the purposes to which it was best adapted; that a person will not be allowed to destroy the property of another by a series of threatened trespasses, and then remit him to his remedy at law to recover damages sustained, but equity will interfere to enjoin the threatened <sup>433</sup> injury at any period of its perpetration, and thus prevent a multiplicity of suits.

*Bemis v. Upham*, 13 Pick. 169, was a case where an injunction was sought to prevent the keeping up of a milldam, which set back the water so as to overflow the plaintiff's dam higher up. It was admitted by the defendant in that case that the grievance complained of was a nuisance, but it was objected that there was an adequate and complete remedy at law. The court held that a decree in equity was the only sufficient remedy, inasmuch as such decree could extend to all parties having an interest, and bind them effectually forever; that, instead of requiring an entire prostration of the



nuisance, the decree might be modified and adapted to the just rights of the parties. It might order an abatement in part, determine the height to which the dam might be kept, the terms on which it might be kept up, the mode of using the water, and other incidents.

So, in the case before us, the restraining order forbidding the filling up of the trestlework with earth might be, and, in fact was, so modified that the appellant might be allowed to fill up the whole space except that occupied by the culvert, and an additional space of fifteen feet, and thus adapt the decree to the just rights of the parties, giving to the appellees all the relief necessary to allow the floods to escape readily, and so protect their land from the overflow, and at the same time enable the appellant, with the least inconvenience, to put its road in good condition.

We think the relief by injunction was the only adequate and complete remedy, and that the complaint is good for that purpose: *McGoldrick v. Slevin*, 43 Ind. 522; *Clark v. Jeffersonville etc. R. R. Co.*, 44 Ind. 248; *Cox v. Louisville etc. R. R. Co.*, 48 Ind. 178; *Owen v. <sup>434</sup> Phillips*, 73 Ind. 284; *Patoka Township v. Hopkins*, 131 Ind. 142; 31 Am. St. Rep. 417; *Wilmarth v. Woodcock*, 58 Mich. 482; *Galveston etc. Ry. Co. v. Tait*, 63 Tex. 223; *Moore v. Chicago etc. Ry. Co.*, 75 Iowa, 263; 10 Am. & Eng. Ency. of Law, 835, 843, 977.

Under the assignment of error, that the court erred in its finding of facts and conclusions of law, counsel argue only that the evidence does not sustain the finding. The record shows that there was ample evidence in support of the allegations of the complaint and the findings of the court. Under numerous decisions this is sufficient, even though there were certain computations offered in evidence to show that the culvert might carry the water. For such conflict of testimony, if it be such, we cannot disturb the findings. The court seems to have arrived at a just and equitable adjustment of the rights of both parties.

The judgment is affirmed.

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INJUNCTION TO PREVENT OVERFLOW OF LANDS.—Equity has power to prevent, by injunction, injuries by back flowage of water caused by a dam: *Sheldon v. Rockwell*, 9 Wis. 166; 76 Am. Dec. 265, and note; *Earl v. De Hart*, 12 N. J. Ch. 280; 72 Am. Dec. 395; *Farris v. Dudley*, 78 Ala. 124; 56 Am. Rep. 24. An injunction will issue to stop the diversion or unreasonable obstruction of a watercourse: *Atchison etc. R. R. Co. v. Long*, 46 Kan. 701; 26 Am. St. Rep. 165, and note; *Kay v. Kirk*, 76 Md. 41; 35 Am. St. Rep. 408. See, also, the note to *Wharton v. Stevens*, 35 Am. St. Rep. 303.

## STEFFY v. MONROE CITY.

[185 INDIANA, 463.]

**MUNICIPAL ORDINANCES—WHEN UNREASONABLE.**—A municipal ordinance requiring the removal from the doors and windows of saloons for the sale of intoxicating liquors of all screens and other obstructions to the view of the interior of, and the business transacted within, such saloon is void, as unreasonable, prohibitive of lawful business, and not in the line of regulation.

*W. A. Cullop, C. B. Kessinger, O. A. Buskirk, and J. W. Brady*, for the appellant.

*E. F. Ritter and H. L. Ritter*, for the appellee.

466 HACKNEY, J. The appellee sued the appellant, in the Knox circuit court, for the recovery of penalties prescribed by its ordinance, for maintaining a saloon for the sale of intoxicating liquors without removing from the doors and windows thereof all screens and other obstructions to the view of the interior of and the business transacted within such saloon. The venue of the cause was changed to the Gibson circuit court, where, upon issues formed, a hearing resulted in findings and judgment 467 against the appellant. Upon proper assignments of error the validity of the ordinance in question is attacked in this court.

The ordinance, one section of which was set forth in the complaint, and the whole, as introduced in evidence, is, in its essential features, the same as that involved in the case of *Champer v. City of Greencastle* (Ind., Oct. 31, 1893), except that it contained no preamble declaring an object to aid in the detection and prosecution of crimes, and it contained no provision excepting its application to saloons having the usual and ordinary shutters.

It is earnestly and ably insisted that the ordinance is unreasonable in its interference with, and restrictions upon, the lawful traffic in intoxicating liquors, and that, being unreasonable, it is void. Numerous authorities are cited in support of this insistence, and they would in many instances appear to support this view, but we do not adopt them in limits to which their language seems to extend. It is firmly settled that, when legislative power has been extended, its exercise necessarily involves the authority to determine whether its results are reasonable or unreasonable, and, if the judiciary assumes to pass upon the reasonableness or unreasonableness of the results which flow from the exercise of that power, it

departs from its functions as one of the independent co-ordinate branches of the government: *A Coal-Float v. City of Jeffersonville*, 112 Ind. 15; *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426.

It would result in the greatest confusion of decisions to permit, in any case, the introduction of evidence as to the effect of an ordinance upon a business, trade, or occupation. The jury would in one case hold that under the facts proven the ordinance was invalid, while in another case, with more or less evidence of its hurtful consequences, the ordinance would be held valid. Nor <sup>468</sup> would it be more just to permit the reasonableness of an ordinance to be determined by the court, as a question of law, arising upon the face of the ordinance, and from a judicial knowledge of its harmful effects. To do so would be to deny the right of the legislative branch of the government, whether local or general, to judge of the wisdom and prudence of its own enactments, or it would result in the co-existence of power in the legislative and judicial departments to judge of that wisdom and prudence which would invite endless conflict of decision between the departments.

The exact question here is, as it must be in every case involving the exercise of legislative functions, Does the power exist to pass the act or adopt the ordinance?

As we said in *Champer v. City of Greencastle*, 35 N. E. Rep. 14: "Municipal corporations have such powers only as are conferred upon them by the act of the legislature creating them, and such incidental powers as are implied by their creation, and as are essential to the accomplishment of the purposes of their creation, and for their continued existence."

In that case it was held that cities had no power to pass such an ordinance as that now before us, and we must adhere to that ruling. If there is no greater power given by the legislature to towns than to cities, with respect to the liquor traffic, that case must, in its conclusion, rule the present. Cities have the express power to license and regulate the sale of liquors: Rev. Stats. 1881, secs. 3106, 3154.

The language of the grant of power to towns is as follows: "To license, regulate, or restrain . . . the sale of spirituous, vinous, malt, or other intoxicating liquors": Rev. Stats. 1881, sec. 3333.

The ordinance in question, while not expressly denying, does infringe the power of the saloon-keeper to sell <sup>469</sup> under a license, although counsel for the appellee insist that the

## DICKSON v. WALDRON.

[125 INDIANA, 507.]

**MASTER AND SERVANT—THEATER MANAGERS—DUTIES AND LIABILITIES OF**

Theater managers who invite the public to become their patrons and guests owe a special duty to those accepting such invitation to protect them from injury while present, and particularly that they shall not suffer wrong or injury from the agents or servants of those who have invited them; and if such a servant, acting within the line of his duty, commits a wrongful act toward such patron or guest, the manager and master is liable in damages therefor.

**MASTER AND SERVANT—THEATER MANAGER'S LIABILITY FOR WRONGFUL ACT**

**OF HIS SERVANT.**—The servant or agent of a theater manager whose duty it is to preserve order in and about the theater must necessarily be the judge as to whether the conduct of a patron or guest is so offensive and disorderly as to require his removal, but if such servant, acting in the line of his duty, makes a mistake and wrongfully and unjustly attacks and injures an inoffensive patron of the theater, the manager thereof must respond in damages, and the fact that such servant is a special policeman will not relieve the manager and master from liability.

**WITNESSES—COMPETENCY—QUESTION FOR TRIAL COURT.**—The competency of a person offered as a witness to testify must be decided by the trial court, then and there, and its ruling is not subject to review nor disturbance, on appeal, unless a clear abuse of discretion is shown.

*W. H. H. Miller, F. Winter, J. B. Elam, B. K. Elliott, W. F. Elliott, P. Norton, R. O. Hawkins, and H. C. Smith, for the appellants.*

*O. Gresham, J. B. Kealing, and M. M. Hugg, for the appellee.*

<sup>507</sup> **HOWARD, J.** On October 1, 1887, and at the time of the bringing of this suit, appellants were the lessees and managers of the Park Theater, in the city of Indianapolis. At the entrance to the theater, about three feet from the sidewalk, a flight of stairs ran up to a landing, at the rear of which was the box-office for the sale of <sup>508</sup> tickets. At either side of the landing a flight of stairs led up to the east and west entrance doors to the theater. At the top of the first flight of stairs, at the edge of the landing, gates were placed, four feet high, to keep the crowd back. Between these gates was an opening, where the chief officer of the theater, named Klingensmith, an employee of appellants, stood while the crowd was coming up, after which the gates were opened, and this officer went to keep order in the gallery.

Appellants also managed and controlled other theaters in Indianapolis and elsewhere, and, in their absence, John Dickson, brother of the appellant George A. Dickson, was the gen-

eral manager of Park Theater, acting for appellants. He also assisted in selling tickets.

John M. Kiley was the head janitor of the theater, and lived, with his family, in the theater building. He was also doorkeeper, and stood at the west door, but could leave in case of emergency. At the request of appellants he was granted special police powers by the metropolitan board of police of the city of Indianapolis, such powers to be exercised at the Park Theater. He received his pay from appellants. He had been in the employment of appellants at the theater before receiving his police powers, and his pay was not increased after receiving such powers. Appellants requested his appointment at the suggestion of the chief police officer, Klingensmith, for the purpose of assisting him in preserving order in the theater. He was not relieved of any of his duties in the theater after being appointed special policeman. His instructions from appellants were not to make any arrests, except to assist Klingensmith, unless otherwise ordered by appellants, or by John Dickson. In Klingensmith's absence Kiley acted for him.

Joseph Gordon was treasurer and ticket-seller for the theater.

509 On the evening of October 1, 1887, Joseph Gordon was in the box-office selling tickets. John Dickson was also in the box-office assisting in the sale of tickets.

On that evening appellee, who was a conductor on the Indianapolis, Decatur, and Western Railroad, came with four friends to attend an entertainment at the theater. Appellee testifies that he went upstairs to the ticket-office and called for a ten cent ticket; that he gave the ticket-seller, Joseph Gordon, a silver dollar, and received from him his ticket and only seventy cents in change, and that another of the party, named Doran, also had some misunderstanding as to the purchase of his ticket.

The testimony of appellee then proceeds: "I do not remember just exactly whether Doran had purchased his ticket before me or after I did. He wanted a ticket to go upstairs, too, and they gave him a ticket to go downstairs, and I says to the ticket-seller like this, I said, 'Here is five of us in a party, and want to go together; you have made a mistake in our tickets.' He said, 'What is the matter with you? Get away from that window and give others a chance.' I said, 'I am not going until I get my right change. You have made a mistake in my change, too,' and held out my hand—I had

not taken my hand down from the shelf in front of the window—and he reached through the window and grabbed my change and ticket, and slapped me in the face at the same time, and said, ‘Damn you, get away from that window’; and reached for my brakeman and grabbed his ticket, and said, ‘Police,’ or ‘Johnny,’ I do not know which, ‘Police,’ or ‘Johnny, arrest that man for a vag.’ A man named Kiley, there, a private policeman for the theater company, stepped up at the side of me, or behind me, and knocked me down.”

He testifies that the first blow was on the left forehead, which knocked him partly down on his left elbow; that <sup>510</sup> when he attempted to rise Kiley struck him again; that altogether he was struck six times on the head, three times on the left shoulder, and twice on the left forearm; that during this time Kiley said nothing to him, but that he asked Kiley what he was beating him for, “and I said if he had any thing to arrest me for, to arrest me, and for God’s sake not to beat my brains out.”

Somebody then interfered, and Kiley for the time withdrew, and then Gordon came out of the ticket-office and grabbed appellee about the neck with his left arm, and began pounding him in the face with his fist, then knocked him down and kicked him two or three times; that Kiley then arrested him, and sent him to the police station.

The testimony of appellants’ witnesses as to the transaction differs in almost all the details from that given by appellee, but not in the main facts; that is, the beating of appellee in front of the ticket-office by Gordon and Kiley; that the quarrel resulted from disputes as to the purchase of tickets; that both assaults were made upon appellee before his arrest by Kiley, and that appellee did not strike either of his assailants.

The testimony of Joseph Gordon and John Kiley shows their treatment of appellee to have been most brutal. Gordon testifies that he and John Dickson were in the ticket office when appellee came up and threw down a silver dollar and asked for a ticket, not specifying what priced ticket; that he gave him his ticket and the proper change. His testimony then proceeds: “He,” Waldron (appellee), “said, ‘You did not give me my right change.’ I said, ‘Yes, sir.’ He said, ‘No, sir.’ I said, ‘I gave you just the exact change with your ticket, and if you did not get your change somebody else got it.’ He said, ‘You did not.’ I said ‘I did.’

. . . . I sold two or three tickets while he stood there arguing." That appellee <sup>511</sup> then called him a vile name. "I said, 'Be careful, I won't take that off of anybody; you or anybody else.' He said, 'I want my change.' I said, 'Your change was right, and, if it is not, when we make up the house our cash will show it, and if there is any over we will make it good to you.'" That thereupon appellee repeated the vile name, and Gordon went out of the ticket-office and attacked appellee. "He was standing up pretty near the office, and I hit him, and he turned around and squared, and I hit him again. . . . I could not say how hard I hit him; I hit him pretty hard; I tried to. . . . In the face." That there was nothing said between them after Gordon came out of the office. "Then we got on over to the stairway, and I hit him again, and got my arm around his neck, and we were about three or four steps down from the top. . . . I caught him around the neck with my arm and pulled him down. . . . I got him down on the stairway and hit him two or three times more, and I kicked him a couple of times. . . . I hit him in the face. . . . I hit him three or four times there, and kicked him, and then he said, 'I have enough.' . . . Mr. Kiley was downstairs at the time, out on the sidewalk. . . . I had quit when he halloed, 'I have enough.' . . . Kiley was coming up when he said that, and I said, 'Kiley arrest this man.' When Kiley came up I started to let go when [some] fellow said, 'Give it to him.' Kiley hit him with the mace." That when Kiley hit Waldron (appellee) the latter was "partially down; just about half-way up. . . . I was very near up on my feet. . . . When Kiley came up and hit him I let go of him, and went upstairs and went into the office and sold tickets."

The witness Adkins, who was ticket-holder at the east door, testified: "I thought I would go down and see <sup>512</sup> and stop that fussing if I could. . . . They had hold of each other when I got there. . . . I just stooped down and put my hand under their shoulders and assisted them. . . . Just as I was in the act of raising them up I threw my eyes down the stairway and saw Mr. Kiley coming up, and just about the time they got straightened on their feet Mr. Gordon said to Mr. Kiley, 'Arrest that man.' Mr. Kiley came up to him, and I saw Mr. Kiley throw up his left hand . . . and the next I saw he struck him . . . with his mace."

Kiley himself testified that the appellant, Henry M. Tal-



bott, had instructed him that his "duties were to take tickets at the door, and supervise the cleaning of the house, and assist Mr. Klingensmith in making arrests or preserving order." That sometimes when employees would come to him and tell him that there was a disturbance in some part of the house he would go there.

As to the disturbance he testified: "I was walking up the stairway and happened to glance up, and I saw Mr. Gordon having a fight, fighting with a man on the stairway. . . . The man's head was up against the casing on the west side of the stairway. . . . He was sitting facing me as I came up. . . . He [Gordon] was on the step above him, and had hold of him. . . . I did not hear the man say any thing; Gordon only said 'Arrest this man.'"

"What did you do after striking Mr. Waldron?" "I arrested him."

John Dickson had remained, during the whole time, in the ticket-office, and had seen the greater part of the conflict, as detailed by Gordon and Kiley, and in his testimony corroborates most of their statements.

He says: "I went on selling tickets and took no further notice of it; things of that kind are liable to occur <sup>512</sup> every once in a while." That he remained selling tickets; did not go out during the whole trouble; did not say any thing to Gordon when he first told him what the trouble was; did not give any directions to anybody; saw Kiley coming up the stairs to where Gordon had hold of Waldron, and they were struggling and partly raised up, getting on their feet. "I do not think I said any thing to him [Kiley]. . . . I went on selling tickets."

The appellant George A. Dickson testified that Kiley was not to assist in any arrest unless called upon by Klingensmith, or unless under instructions of appellants or of John Dickson; that John Dickson acted for them in their absence.

The appellant Henry M. Talbott testified that he agreed with the evidence given by his co-appellant, and that the answers given by him were correct. He stated further that while Kiley was in the theater he generally did what appellants told him, but was not sure that he gave Kiley orders, personally; that "John Dickson was deputized to look after that."

John Dickson was not only present on this occasion, but was generally at the theater during entertainments. He tes-

tified that he "wore off his vest," leaning against the inside shelf of the ticket-office. He acted for appellants in signing the firm name to the request made for Kiley's appointment as policeman.

This request was as follows:

"INDIANAPOLIS, IND., April 21, 1887.

*"To the Board of Metropolitan Police Commissioners of the City of Indianapolis:*

"The undersigned respectfully request your board to confer special police powers on John M. Kiley, who is employed and paid by the undersigned, the said police <sup>§14</sup> powers to be used in and about Park Theater and Dime Museum, Indianapolis, Indiana.

"And, in consideration of said grant of police powers, the undersigned hereby become responsible for his obeying your rules, and for all illegal acts done by said John M. Kiley while doing duty as said special policeman.

"DICKSON & TALBOTT.

"J.

"Approved: N. R. RUCKLE, Pres't. Bd. M. P. Commrs."

The complaint was in seven paragraphs, alleging three causes of action against appellants—assault and battery, false imprisonment, and malicious prosecution. The court refused to admit evidence as to the charges of false imprisonment and malicious prosecution, and instructed the jury to find for the appellants on those issues. The court also instructed the jury that the appellants were not liable for the alleged assault and battery by Gordon, the ticket-seller. Whether there was error in such ruling and instructions in favor of appellants we need not inquire, since appellee has not insisted on it.

The jury found a general verdict for appellee as to the assault and battery, and for appellants as to the other two charges.

The jury also found, in answer to special interrogatories, that John M. Kiley, while in appellants' theater, on October 1, 1887, struck appellee a number of blows upon the head with a mace, and thereby inflicted severe wounds.

That such blows resulted in appellee's losing the hearing of his left ear, and otherwise permanently disabling him, and causing him to lose his situation as freight conductor.

That appellee, at the time and place mentioned, in the view of John M. Kiley, did not commit any crime. or <sup>§15</sup> vio-

late any ordinance of the city of Indianapolis, and that the said Kiley had no warrant for the arrest of appellee.

That John M. Kiley, at the time alleged, was an employee of appellants; that he said nothing to appellee before assaulting him; that it was one of the duties of Kiley, as the servant and employee of appellants, to preserve order and suppress disturbances in appellants' theater, and that he had received from appellants general authority for that purpose.

That appellee, while in appellants' theater on said occasion, had not committed any crime, nor violated any ordinance of said city.

That the said Kiley, at said place and time, assaulted and beat appellee on the head with his mace before he arrested him; that the said Kiley, when so assaulting appellee, was acting as the servant and employee of appellants, and engaged in their business, and acting within the general scope of the duties of his said employment.

That John T. Dickson, brother of one of the appellants, was at said time present in the box-office of said theater, and did on said occasion, and prior thereto, sell tickets for appellants; that with the knowledge of appellants, at and prior to said time, the said John T. Dickson went to said theater and gave instructions to appellants' employees; and that, in the absence of appellants, the said John T. Dickson was deputed to act for them at their said theater as manager; that he signed the firm name to the application for police powers to be conferred upon the said John M. Kiley, and that he had authority to so sign said firm name; that appellants were at said time the lessees and managers of said theater; that all the injuries received by appellee in and about said theater on said evening were inflicted by said John M. Kiley; that said Joseph Gordon was an employee of appellants<sup>516</sup> as one of the ticket-sellers on said evening, and was then and there on duty; that said John M. Kiley was an employee of appellants as janitor and as ticket-taker at the west entrance door of said theater on said evening; that he was commissioned as special policeman about April 22, 1887, to act in connection with his other duties at appellants' said theater, and at their special request; that at the request of said Gordon said Kiley did arrest said appellee on said evening; that all the wounds and bruises received by appellee at said theater on said evening were inflicted by said Kiley, near said ticket-office, and before the arrest of appellee; that

neither of appellants was present at the time appellee received his injuries, and neither of them had directed or advised any assault upon appellee.

It is enough to say that these answers are fully sustained by the evidence in the record.

The main question in this case, and perhaps the only one that need be decided, is, Whether appellants are liable to appellee for the injuries inflicted upon him by their employee, John M. Kiley?

The treatment due from a carrier to his passenger, from an innkeeper to his guest, and from a theatrical manager to his patron, while perhaps differing in degree, is similar in kind.

The duty of a railroad company to its passengers is well expressed in *Indianapolis Union Ry. Co. v. Cooper*, 6 Ind. App. 202. This was a case where a passenger, having purchased his ticket, was in the company's station on his way to his train, when he was assaulted by one of the "gatemen"; and it was contended by the company that the gateman, in making the assault, was not acting in the scope of his employment. The court said: "It seems to us reasonably clear . . . that the servant was, at the time <sup>517</sup> of doing the acts complained of, on duty for his master, and at or near his proper place, and that the assault was committed on appellee while he was properly on the master's grounds, and under the charge of the master's servants, and entitled to their protection rather than their abuse. . . . Moreover, the appellee did not bear the relation of a stranger to the appellant, but, on the contrary, it owed to him an affirmative duty to protect him from the violence and insults of its own servants at the station. It is well settled that one who has purchased his ticket, and is passing at the proper time from the depot to the train, is a passenger, and entitled to the rights of a passenger. . . . One of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants, nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment."

In *Lake Shore etc. Ry. W. Co. v. Prentice*, 147 U. S. 109, it is said: "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the prin-

cipal": See, also, *Citizens' Street Ry. Co. v. Willoeby*, 134 Ind. 563.

In *Chicago etc. Ry. Co. v. Bayfield*, 37 Mich. 205, Cooley, C. J., speaking for the court, says: "It is, in general, no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risks of such disobedience when he puts the servant into his business; and the reasons for holding him responsible for the servant's conduct are the same, whether the injury results from a failure to observe the <sup>518</sup> master's directions, or from neglect of the ordinary precautions for which no specific directions are deemed necessary. It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible; this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an excess of authority, committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority; the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction."

In *Higgins v. Waterliet Turnpike etc. Co.*, 46 N. Y. 23, 7 Am. Rep. 293, the following is quoted with approval from an English case: "It is said that though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibuses generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove an offensive passenger, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibuses, and he puts his guard in his place; therefore, if the guard forms a wrong judgment the master is responsible."

<sup>519</sup> In *Drew v. Peer*, 93 Pa. St. 234, which was a case where Peer and his wife had purchased tickets and entered a theater, and were ejected with force by the attaches of the theater, because of their being colored persons, the following were approved as correct instructions to the jury: "If the ticket-agent had called upon any one in the crowd 'to put that nigger out,' and some ruffian had done so, the defendant would be liable. . . . If the injury was committed by an agent out of the usual course of employment, the defendant was not responsible; but, if the injury was committed by the defendant's doorkeeper or ticket-taker, then it was in the course of their employment."

In the case at bar it was the ticket-agent, Joseph Gordon, who called out to have appellee arrested, and it was not a ruffian bystander who put him out, but it was appellant's doorkeeper, acting in the course of his employment. In this case, also, the evidence shows, and the jury so found, that appellee was without fault.

The trouble was occasioned entirely by a dispute as to the purchase of tickets, and both the ticket-seller and the doorkeeper acted within the business of their employment, maintaining that side of the controversy, which was in their master's interest.

In *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293, it was claimed that no authority had been given to turn out an inoffensive passenger, and that, therefore, there was no liability for the servant's acts; but the court held that the authority to remove an offensive passenger necessarily carried authority to determine whether any passenger was offensive or not. So here, the matter was about the master's business, and the servant, of necessity, must be the judge as to whether the conduct of appellee was such as to require his removal; and if a mistake was <sup>520</sup> made, and an inoffensive patron of the theater was unjustly attacked and injured, the master must respond.

"It is not convenient for the master personally to conduct the [business of keeping order in his theater], and he puts his guard in his place; therefore, if the guard forms a wrong judgment the master is responsible": See, also, *Goff v. Great Northern Ry. Co.*, 3 El. & E. 673.

But this case is even stronger; not only was the master here represented by his ticket-agent and his janitor or doorkeeper, but his special agent, John Dickson, "deputized to

act in his absence," was present in the theater ticket-office and looking out through the window upon the whole transaction. He testifies that he said and did nothing in the premises, and his silence can be taken only as his and appellants' approval of what was done.

Indeed, no rule is better established than that a principal is responsible for the acts of his agent performed within the line of his duty, whether the particular act was or was not directly authorized, and whether it was or was not lawful: *Evansville etc. R. R. Co. v. McKee*, 99 Ind. 519; 50 Am. Rep. 102; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *American Express Co. v. Patterson*, 73 Ind. 430; *Lake Shore etc. Ry. Co. v. Foster*, 104 Ind. 293; 54 Am. Rep. 319.

But common carriers, innkeepers, merchants, managers of theaters, and others who invite the public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them: <sup>521</sup> *Chicago etc. R. R. Co. v. Flerman*, 103 Ill. 546; 42 Am. Rep. 33; *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504.

But it is said that John M. Kiley was a policeman, and therefore appellants are not responsible for his attack upon appellee. Whether, at the time of the injuries complained of, Kiley was acting as a policeman or as agent of appellants must depend upon the acts done by him. Because he was a police officer it does not follow that all his acts were those of a policeman; and, because he was an agent of appellants, it does not follow that all his acts were those of such agent. Even if he were a regular patrolman, called in off the street by appellants or their agents to aid in enforcing the regulations of the theater, he would, for such purpose, be only an agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater, he should discover appellee in the act of violating a criminal law of the state or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of appellants, then ap-



pellants would not be responsible: *Jardine v. Cornell*, 50 N. J. L. 485.

In this case, however, such questions do not arise. The court expressly withdrew from the consideration of the jury the issues made under the allegations of false imprisonment and malicious prosecution, and directed a verdict for appellants on these issues. Nor was any evidence admitted on these issues. Besides the evidence given by both appellants and appellee showed unquestionably that all the injuries received by appellee were inflicted upon him before he was arrested; and it is still <sup>522</sup> further established that appellee had done no act for which he should be arrested, and the jury so find.

Kiley's acts as a policeman were committed after he had assaulted and beaten appellee. It could not be seriously contended that Kiley could do no wrong as a janitor and doorkeeper, but that every wrong done by him should be charged to his official character. This would enable a proprietor to have all his employees commissioned as police officers, and thus escape all liabilities for their misconduct to his patrons.

It is a question whether appellants should not be held liable for all the acts of Kiley, whether as special policeman, acting only for his employers, or as janitor or doorkeeper, all being within the scope of the business of his employment; but, as we have seen, such question is not before us. The verdict of the jury is in favor of the appellee on the charge of assault and battery; and the evidence, as well as the findings of the jury, show that all assault and battery committed upon appellee was committed before Kiley exercised any of his powers as a police officer, and before he made the arrest of appellee.

If appellee had attempted to resist arrest, or if he had attempted to get away after arrest, and he had received his injuries in consequence of such attempts, or if he had even committed any crime for which he should be arrested, there might be some reason in appellants' contention on this point. But, on the contrary, it is clear that appellee was innocent of any wrongdoing for which he should be arrested; he never even struck back at either of his assailants. He neither resisted arrest nor tried to get away when arrested. The only words uttered by him were rather a request to be arrested, and so avoid further danger to his person. "I asked him what he was beating me for, and I said if he had any thing to

arrest <sup>523</sup> me for, to arrest me, and for God's sake not to beat my brains out."

The cases of *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448, and *Hershey v. O'Neill*, 36 Fed. Rep. 168, are cases relied upon by appellants. In the first of these cases it seems to be held by the court that a clerk or superintendent of a store has not, by virtue of such employment, authority "to arrest, detain, and search any one suspected of having stolen and secreted about his person any of the goods kept in such store."

We think this cannot be the law. It is not in harmony with the weight of authority, nor with sound reason. If a superintendent or clerk of a store has such suspicions aroused in his mind by the actions of some visitor at the store, but two courses remain for him, either to let the supposed thief go free, or to search him. The first course cannot be taken without unfaithfulness to the interests of the employer. The employer must, therefore, be held to sustain his superintendent in taking the second course, and, if a mistake is made, the employer must certainly be liable. He has selected his clerk, and must rely upon his judgment to act for his interests in his store. The clerk, in securing the stolen property, is not acting for himself, but for his employer.

In the case of *Hershey v. O'Neill*, 36 Fed. Rep. 168, the court seems to place its decision chiefly, not on the grounds assumed by appellants, but on the grounds that the plaintiff had, in fact, been guilty of an attempt to steal the goods, and that, consequently, a just verdict had been rendered, which ought not to be disturbed.

The other alleged errors discussed by counsel for appellants show no sufficient reason for disturbing the judgment rendered. The complaint was sufficient, under the statute. There was no available error in the rulings of the court on the evidence. The instructions <sup>524</sup> to the jury were all that appellants were entitled to ask, and were more favorable to appellants than to appellee. There was a verbal error in one of the answers of the jury to an interrogatory, but it was harmless to appellants; the interrogatory was fully answered by the answer to the preceding interrogatory. The verdict and the answers to interrogatories are fully sustained by the evidence, and we find no available error in the record.

The judgment is affirmed.

## ON PETITION FOR A REHEARING.

HOWARD, J. Owing to the importance of this case we have given particular consideration to the petition for a rehearing, and to the reasons therefor advanced by counsel, but find no cause to change our opinion on the merits of the case.

Because the complaint alleged that appellee's mind had been impaired by reason of his injuries, and because evidence in support of this allegation had been received, it is urged that the court erred in allowing appellee to be called, and to testify as a witness. Whether, at the time of the trial, the appellee, or any other person offered as a witness, was in fact competent to testify, was a question that must be decided by the court then and there. The witness was before the court and jury, and, whether he had been injured in body or in mind on the occasion of the assault, it does not follow that, at the trial, he was incompetent to testify; that was a question for the court to determine, and we do not find that any abuse of discretion was shown. It was for the jury to give such credit to the testimony offered as it was entitled to receive.

Counsel also argue that because Kiley was appointed special policeman by the board of metropolitan police <sup>525</sup> commissioners, under the statute of the state, therefore this case is widely different from the cases cited in support of the opinion, in which police powers are conferred by law upon a particular class of persons in a particular line of employment, as, for instance, conductors on railway trains. Counsel say that such persons are not appointed by any public official, and that their choice and selection, their employment and discharge, are entirely within the power and control of the persons who are their superiors, and who are engaged in carrying on the business with which such appointees are connected. And counsel conclude that the reason for the difference between such appointees and special police officers is founded upon the principle that the person who selects another to act for him is bound to select one who will do no wrong.

When police powers are conferred by law upon a particular class of persons in a particular line of employment it is difficult to see why a different rule should apply from that which obtains when such powers are conferred by a public official who himself derives his authority also from the law. In the one case the law confers the powers directly; in the other the powers are conferred by an official authorized by the law itself to do so. In both cases the selection is made by the person

for whom the officer is to act; as, in this case, Kiley was selected by the appellants, and they expressly bound themselves that they would be responsible for his acts; in other words, that he would do no wrong.

Kiley, by this appointment, was not "made appellants' agent without their consent," but was appointed police officer for their house at their special instance and request, as the record shows. He received his pay from, and was employed solely by, appellants, and they might discharge him at any time.

<sup>526</sup> But, besides this, the jury found that the wrong done by Kiley was not done in his capacity as policemen, but that, "When he assaulted and beat the plaintiff, he was acting as the servant and employee of the defendants, and engaged in the defendants' business, and within the general scope of the duties of his employment by the said defendants." And these findings are supported by the evidence.

The petition for a rehearing is overruled.

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**MASTER AND SERVANT.**—The general rule is that the master is liable for the acts of his servant, though done willfully and maliciously, if such acts were committed during the course of the servant's employment: *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261; 28 Am. St. Rep. 632; *Stephenson v. Southern Pac. Co.*, 93 Cal. 558; 27 Am. St. Rep. 223, and note; *International etc. Ry. Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902, and note; *Duggan v. Baltimore etc. R. R.*, 159 Pa. St. 248; 39 Am. St. Rep. 672, and note. If a servant, while deviating from the strict line of his employment, is really engaged in the execution of the master's business, it is immaterial that he joins with this some private business or purpose of his own, and the master is still liable, but if the servant during such deviation is on a frolic of his own, without being at all on his master's business, the latter is not liable: *Ritchie v. Waller*, 63 Conn. 155; 38 Am. St. Rep. 361, and note, showing the effect of deviation.

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## BARNARD v. SHERLEY.

[135 INDIANA, 547.]

**WATERCOURSES—RIGHT TO POLLUTE.**—One who sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on such premises, is not liable to an injunction, nor for damages for allowing the water, after being so used, to flow into a stream which is the natural watercourse of the basin in which the artesian well is situated, the owner thereof being free from negligence or malice, and using all due care in avoiding injury to his neighbors.

**WATERCOURSES—RIGHT TO POLLUTE.**—The natural right of a lower owner to have the water of a natural stream descend in its pure state must yield to the equal right of the owner above to use the water for useful

and lawful purposes tending to make it more or less impure. It is not under all circumstances an unlawful or unreasonable use of a stream to throw or discharge into it waste or impure matter, and the question whether or not in any particular case such use is reasonable or not is for the jury to decide.

**RIPARIAN RIGHTS—DAMNUM ABSQUE INJURIA.**—Every man has the right to the natural use and enjoyment of his own property, and of a natural watercourse thereon, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor below, it is *damnum absque injuria*.

**DAMAGES FROM LAWFUL ENTERPRISE—DAMNUM ABSQUE INJURIA.**—When a work is lawful in itself, and cannot be carried on elsewhere than where nature located it or public necessity requires it to be, those liable to receive injury from its operation only have a right to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation, as it is *damnum absque injuria*.

**INJUNCTION—RIGHT TO, HOW LOST.**—A person by remaining silent and inactive, and allowing acts to be done and expense to be incurred, may lose his remedy by injunction, and be compelled to assert his rights at law.

**PRACTICE—DEMURRER—HARMLESS ERROR.**—It is only when the allegations of a proper paragraph of pleading may be established by proof under other paragraphs that the sustaining of a demurrer to the paragraph in question is held harmless.

*J. H. Jordan, O. Matthews, and W. R. Harrison, for the appellants.*

*W. S. Sherley, J. V. Mitchell, and M. H. Parks, for the appellee.*

548 HOWARD, J. Since May, 1886, the appellee has been the owner of certain lots and lands, in and adjoining the city of Martinsville, occupied by her as a farm. Appellants are the owners of certain lots in the city of Martinsville, adjoining the lands of appellee. During the years 1887 and 1888 a well was drilled upon appellants' lots to the depth of eight hundred feet, in search of gas. Instead of gas a large volume of water flowed from the well, and has so continued to flow ever since. The water having been found by analysis to possess curative properties for certain diseases, appellants erected a bath-house upon their said lots, to be used for bathing persons afflicted with diseases, who might be benefited by the artesian waters.

On the sixteenth day of September, 1889, the appellee filed her complaint against the appellants, in the Morgan circuit court, alleging that appellants after using said artesian water in bathing the bodies of diseased persons, the same having

all manner of diseases, including syphilitic, and after said water had become befouled and polluted <sup>549</sup> thereby, cause the same to be conveyed in a tile ditch underground, constructed by them, to the lands of appellee, causing such water to flow upon and over the lands of appellee and into a natural stream of water running thereon, causing said natural stream of water to become befouled and polluted thereby, exposing the same to the stock pasturing and feeding upon appellee's said land, where such stock is accustomed to run, feed, and pasture, such as milch cows, horses, and hogs, and the same drinking said water in its befouled and polluted condition as aforesaid; that said stream of water is a small spring branch of pure water, having its source in springs about one mile from appellee's land, and confined in a small channel upon appellee's land, and passing through appellee's land the distance of fifty-three rods, and having no outlet, but sinking into the lands of appellee and others below; that said artesian water in its polluted condition, so caused by appellants as aforesaid, and so caused to flow upon appellee's land, accumulates in great ponds of water upon appellee's said premises, becoming polluted and stagnant thereon, to the great and irreparable damage of appellee and her said land, and to the stock pasturing and feeding thereon, also endangering the health of persons living upon said land, and drinking the milk from said cows; that said mineral water from said artesian well never at any time flowed upon appellee's land and into said stream of water, by percolation or otherwise, until the same was caused to flow thereon and therein by appellants, in manner as aforesaid. Concluding with a demand for damages in the sum of one thousand dollars, and praying that appellants be forever enjoined from causing and permitting said water from said well to run upon and flow over the lands of appellee, and into said stream of water, and for other proper relief.

<sup>550</sup> A demurrer having been overruled to this complaint, appellants answered by general denial, and also by special plea. There was a motion to strike out parts of the special answer, which motion was sustained. A demurrer was afterwards filed to the second paragraph of the answer, which was sustained. Appellants moved for a jury to try the cause, and also moved for a jury to answer questions of fact, both of which motions were overruled. To all of these rulings appellants duly excepted.

The cause was submitted to the court, and the court, having heard the evidence, found for the appellee, assessing her damages in the sum of fifty dollars, and appellants were "enjoined from causing or permitting the water of the artesian well, which shall have been used at their sanitarium and bath-house, . . . . in bathing or washing persons afflicted with syphilis or other infectious ailment or disorder, to flow into said branch or stream, . . . . or over and upon the lands of plaintiff; . . . . and are further enjoined and restrained from polluting or corrupting the water from said well, which may be left by them to flow into said branch and stream, in such manner that the water of said branch and stream other than that flowing from said well may be rendered dangerous or injurious to livestock."

A motion for a new trial was overruled.

Various errors are assigned and discussed, but the controlling questions in the case arise under the ruling of the court in sustaining the demurrer to the second paragraph of the answer. This paragraph of answer, omitting the parts stricken out as not material, or as being such as might have admitted of proof under the general denial, is as follows: "For further answer they (appellants) say that the stream of natural water set forth in plaintiff's complaint is a small stream and branch which flows from sources northeast of the city of Martinsville, <sup>551</sup> thence southward to near the center, north, and south of said city, thence westward across said city, thence south to and across plaintiff's said land, and has so flowed for many years prior to plaintiff's having any interest in said land; that the said well from which said waters flow upon the said lots of defendants was dug and bored, and the flow thereof caused, by an association of many citizens of said city of Martinsville, with the assent and approval of plaintiff; that the only means or way of escape of said water is in and along said branch over the said lands of plaintiff; that for more than one year after the said well was so dug and bored the waters therefrom flowed from defendants' said lots into said branch by open ditches, and were so caused to flow by the said association of persons who dug and bored the [same], and without objection by plaintiff, and with her acquiescence; that thereupon and thereafter, upon testing said waters by scientific analysis, by drinking and using the same in baths, they were found to be of great value, and to have highly curative properties, and to be of great service and value in healing persons



afflicted with various disorders, rheumatism, neuralgia, kidney affections, paralysis, and many other disorders.

"Whereupon defendants erected a bath-house, to utilize said waters, for the benefit of all persons so afflicted, upon their said lots, at a cost of ten thousand dollars; and have treated, benefited, and cured hundreds of persons from all parts of the country so afflicted as aforesaid, and are still engaged at their said bath-house in healing and curing such sick and afflicted; that in erecting said bath-house, and in using said waters of said artesian well for the healing of persons as aforesaid, and in all defendants did in the use of said waters and the draining of the same away, as complained by said plaintiff, said defendants used all proper and possible care to avoid injury, damage, <sup>552</sup> or inconvenience to said plaintiff and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid; that said plaintiff stood by and assented to, and acquiesced in, the said expenditure of said sum in the erection of said bath-house by defendants; that, after so erecting said bath-house, defendants placed underground a drain, made of porous tile, to convey the surplus water from said artesian well under ground to the branch above plaintiff's land, because the said branch was the only natural and only convenient outlet for said water, and did not thereby materially increase the flow of water in said branch."

The question presented for decision is new in this state: Whether one who sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, is liable to injunction and damages for allowing the water to flow into a stream which is the natural watercourse of the basin in which the artesian well is situated, the owner being free from negligence or malice, and using all due care in avoiding injury to his neighbor.

In a Pennsylvania case the plaintiff was the owner of property on one side of a street, and brought an action for damages for alleged injury to his property by the defendant company, who had constructed its elevated road, on its own land, on the other side of the street. It was alleged that the noise, dust, smoke, and cinders, and the constant jar of passing trains interfered with plaintiff's enjoyment of his property, and lessened its value.

The court in that case premised that under the constitution

of Pennsylvania the company would only be liable if, under the same circumstances, an individual would be liable at common law; and held that in case a natural person were operating the road under the same <sup>553</sup> circumstances he would not be responsible in damages, for the reason that he would have a right to the reasonable use and enjoyment of his property, and, if in such use, without negligence or malice on his part, a loss should unavoidably fall upon his neighbor, he would not be liable therefor.

No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if, in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is a wrong for which there is no liability. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own.

No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence or unskillfulness, and where the act is not done maliciously: *Panton v. Holland*, 17 Johns. \*99; 8 Am. Dec. 369.

We need not consume time by further citation of authorities for so plain a proposition. It is settled law. It is true that this principle is qualified to a certain extent. A man may not carry on a business which poisons the air and renders it unhealthy in a thickly populated neighborhood, and especially in the center of a large city. So establishments which involve danger, as powder-mills and certain kinds of manufactories, must seek a secluded place where as few persons may be inconvenienced as possible. These exceptions to the general rule are well established. But the great interests of mankind must go on unhampered. Railroads must reach cities; the treasures of the earth must be drawn from the mines; factories and mills must send forth noise, dust, and smoke. Inconveniences resulting from <sup>554</sup> such causes must be endured by individuals for the general good, otherwise we should have to forego a multitude of the blessings of modern civilization: *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541; 4 Am. St. Rep. 659, and authorities there cited.

In *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625, the court held that "the right of a party to the free and unfettered control of his own land above, upon, and beneath

the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. . . . A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land it is *damnum absque injuria*." The law is the same in this state: *Shelbyville etc. Turnpike Co. v. Green*, 99 Ind. 205.

Where, in Massachusetts, a riparian owner built a dam across a stream, to create a fishpond on his own land, it was held to be a reasonable use of the water; and a mill-owner below had no cause to complain of it, either at common law or under the statute of that state as to mills. Yet it seems that a mill-owner may not enlarge the quantity of water flowing in a stream from his mill through the land of a lower proprietor by turning a new stream into his pond. The wrong consists in turning any water upon the land which does not naturally flow there. This, however, does not extend to preventing a proprietor upon a stream from digging ditches, or doing other acts in the proper cultivation of his land, though the effect of it is to increase the quantity of water in the stream: Washburn on Easements, 4th ed., 375.

§§ In California a man, in irrigating his farm, turned a stream upon it from an adjacent ravine. The water percolated through the soil into a neighboring mine in such quantities as to ruin the mine. It was held that the farmer was reasonably exercising his right to irrigate his land, and was responsible only for the injuries caused by his negligence or unskillfulness, or for such as were caused by any wanton abuse of his right: *Gibson v. Puchta*, 33 Cal. 310.

In another California case a landowner permitted the water taken from artesian wells on his lands, and carried through a ditch to irrigate his fields, to percolate through the ditch to the injury of his neighbor's land. It was found that at small expense the water might have been drained from the ditch so as probably to prevent the injury, and he was accordingly enjoined from continuing the injury. What might have been the opinion of the court in case the fields could not be irrigated without injury to the neighbor does not appear: *Parker v. Larsen*, 86 Cal. 236; 21 Am. St. Rep. 30.

The general rule in England is that a person discharging noxious substances into a stream will be liable to the riparian owners lower down for any damage occasioned; yet some exception seems to be made in favor of mining operations. Bainbridge *Law of Mines*, 3d ed., 517, says: "It should also be remembered that the prosperity of a mining country and its inhabitants depends upon the successful efforts of the adventurer. The value of all property in the vicinity of mines is inseparably associated with the spirit of adventure. The miner, therefore, should not be harassed in his operations by claims of an unsubstantial or imaginary character; for the benefits he confers generally far surpass the injuries he may commit."

In *Leading Cases on Mines*, Blanchard and Week's <sup>550</sup> Notes, the exception as to mineral products is also made: "But a right to throw refuse from mines into a natural stream, or discharge into it water which has been used for the precipitation of minerals and rendered noxious, may be acquired by prescription, custom, or user. The same rule applies to smelting and washing processes": *Leading Cases on Mines*, Blanchard and Week's Notes, 721, and authorities there cited.

In this country the severity of the English rule is still further relaxed: "If one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give away, and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part": *Losee v. Buchanan*, 51 N. Y. 476; 10 Am. Rep. 623, and authorities cited. "As a general proposition it is safe to say that the owner of land has a right to make reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below": *Garland v. Towne*, 55 N. H. 57; 20 Am. Rep. 164.

The right to flowing water is a right incident to property in land, and, while it is a right common and equal to all through whose land it runs, yet, as one of the gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land. What is such a just and reasonable use may often be a difficult question, depending on various circumstances: *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191; 57 Am. Dec. 85.

Sewage and waste material may be cast into streams, if material injury is not thereby caused. The right of one proprietor to have the stream descend to him pure must yield in a reasonable degree to the right of the upper proprietors, whose occupation of their own lands, and whose use of the water for mill, manufacturing, domestic, <sup>557</sup> or other purposes will tend to make the water more or less impure. So it is of public importance that proprietors of useful manufactories should not be held responsible for slight injuries, or even some degree of interference with agriculture. In regard to some waste deposits in such streams there would seem to be no question. The uniform practice, the convenience, and, in some instances, the indispensable necessity, would seem sufficiently to decide such cases: Gould on Waters, sec. 220.

In *Health Dept. of New York v. Purdon*, 99 N. Y. 237, 52 Am. Rep. 22, which was an action to enjoin the sale of adulterated tea, it was said that: "Courts will not in all cases interfere by way of injunction to restrain the continuance of an illegal trade, the abatement of a nuisance, or the prosecution of a dangerous employment. Its power, however, to do so in case of the exercise of any trade or business which is either illegal, or dangerous to human life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages from which no adequate remedy exists at law."

In that case it was found that, although the teas were adulterated, yet there was no sufficient evidence that the use of the teas was dangerous to human life or detrimental to health, and, therefore, the injunction was refused.

In *Owen v. Phillips*, 73 Ind. 284, it was attempted to enjoin the re-erection of a flouring-mill which had been burned, the claim being made that the mill was a nuisance, and that it could not be operated without becoming a nuisance; that the smoke and cinders made the water of plaintiff's cisterns and wells foul and impure, <sup>558</sup> and that the noise, smoke, dust, dirt, and offensive odors, caused by the running of the mill, essentially interfered with plaintiffs' enjoyment of life and property.

The following instruction in that case was objected to by the plaintiffs, because the court modified it by inserting the words "materially and essentially": "If the jury find from the

evidence that the persons' enjoyment of the plaintiffs in their residence has been and will be materially and essentially lessened by either the noise, smoke, dust, dirt, cinders, horses, mules, or teams, caused by the running and use of said mill, then the allegations of the complaint have been sustained."

The instruction as so modified was, however, approved by this court, the court adding that "a lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one"; quoting, also, with approval from the opinion rendered by Cooley, J., in *Gilbert v. Showerman*, 23 Mich. 448, that in such cases "minor inconveniences must be remedied by actions for the recovery of damages, rather than by the severe process of injunction": See, also, *Bowen v. Mauzy*, 117 Ind. 258.

"The granting or refusal of an injunction rests, in each particular case, in the sound discretion of the court. An injunction ought not, therefore, to be granted when it would be against good conscience, or productive of great hardship, oppression, or injustice, or of public or private mischief": *City of Logansport v. Uhl*, 99 Ind. 531; 50 Am. Rep. 109, and authorities there cited.

The natural right to have the water of a stream descend in its pure state must yield to the equal right of those above. Their use of the stream for mill purposes and the other manifold purposes for which they may lawfully use it will tend to render it more or less impure. <sup>559</sup> The water may thus be rendered unfit for many uses for which it had before been suitable; but, so far as that condition results from a reasonable use of the stream, in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally suffers still greater deterioration. Against such injury, incident as it is to the growth and industrial prosperity of the community, the law affords no redress. So in cities and towns, with their numerous inhabitants and diversified business, with their mills, shops, and manufactories, with their streets and sewers—all the products and means of a high civilization—it would be impossible that the pure streams that flow in from the farmsides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the

necessary results of such causes: *Merrifield v. City of Worcester*, 110 Mass. 216; 14 Am. Rep. 592.

That it is not, under all circumstances, an unreasonable or unlawful use of a stream to throw or discharge into it waste or impure matter, and that whether, in any given case, such use would be reasonable or not, is a question for the jury: See *Angell on Watercourses*, 7th ed., sec. 140 d.

In the case before us the stream flowed through the heart of the city of Martinsville before it reached the lands of appellee. Will it be said that there is any liability for contamination from the refuse of the city? Must it be that one who lives on the lower lands on the banks of a stream shall forbid forever the founding of a city on the lands above; forbid the grading of streets, the building of sewers, the erection of mills, factories, hospitals, or other means of livelihood, comfort, and convenience of the inhabitants?

560 A case, in many of its features, resembling that now before the court is the well-considered case of the *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445. That was a mining case, and the chief question was as to the liability of the mine-owners for the flowage of foul water from the mine into a stream which was the natural watercourse of the basin in which the mine was situated.

The plaintiff in that case, Mrs. Sanderson, had purchased a tract of land in the city of Scranton, on the Meadow brook, near its mouth. The existence of the stream, the purity of its water, and its utility for domestic and other purposes, it is said, was a leading inducement to her purchase of the land. She erected a house, threw dams across the brook to form a fish and ice pond and to supply a cistern, and the water was forced, by hydraulic pressure, from the cistern to a tank in the house, and was used for domestic purposes and for a fountain. The plaintiff alleged in her complaint that the large volume of mine water, which the defendant company poured into the brook above, had corrupted the stream to such an extent as to render it totally unfit for domestic use; that the fish were destroyed, the pipes corroded, and her entire apparatus for utilizing the water rendered worthless. She brought her action to recover damages for such pollution of the stream.

In the course of the opinion the court says: "It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clear and cultivate his land, although



in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to <sup>501</sup> cover it again, or to conduct it out of its course, lest the stream, in its natural flow, may reach his neighbor's land . . . . In sinking his well he may intercept and appropriate the water which supplies his neighbor's well: *Acton v. Blundell*, 12 Mees. & W. 324; *Wheatley v. Baugh*, 25 Pa. St. 528; 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 514; 84 Am. Dec. 511; or, if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, . . . . Wharton on Negligence, 939. . . .

"So, also, each of two owners of adjoining mines has a natural right to work his own mine, in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice may occur to the owner of the adjoining mine: *Smith v. Kendrick*, 7 Com. B. 515.

"One mine-owner may thus permit water, naturally flowing in his own mine, to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner: Bainbridge on Mines, 297. To the same effect are *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Crompton v. Lea*, L. R. 19 Eq. 115.

"The defendants, being the owners of the land, had a right to mine the coal. It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another, without any legal wrong. . . .

<sup>502</sup> "'It is established,' says Cotton, L. J., in *West Cumberland Iron Co. v. Kenyon*, 11 L. R. Ch. Div. 783, 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case Brett, L. J., says: 'The cases have decided that where that maxim (*sic utere tuo ut alienum non lædas*) is applied to landed property, it is subject to a certain modification; it being necessary for the

plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land': *West Cumberland Iron Co. v. Kenyon*, L. R. 11 Ch. Div. 787.

"The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to ownership of coal property, and when exercised in the ordinary manner and with due care the owner cannot be held for permitting the natural flow of mine water over his own land into the watercourse, by means of which the natural drainage of the country is effected. . . .

"The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the mere force of gravity ran out of the drifts and found its way over the defendant's own land to Meadow brook. It is clear that, for the consequences of this flow, which, by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants. . . .

"It is said the defendants created an artificial watercourse <sup>563</sup> from their mine to Meadow brook; but this artificial watercourse was upon their own land, and conducted no more water than, by the natural conformation of the surface, could otherwise have reached it. If it be suggested that the defendants might have extended this artificial waterway, in the form of a sewer, to some point of safety, it may be asked where, short of the sea, might the sewer be discharged that the same complaint might not be made? . . .

"Nor do we say that a miner, in order that his mines may be made available, may enter upon his neighbor's lands, or inflict upon him any other immediate or direct injury, but we do say that in the operation of mining, in the ordinary and usual manner, he may upon his own lands lead the water which percolates into his mine into the streams which form the natural drainage of the basin, in which the coal is situate,

although the quantity, as well as the quality, of the water in the stream may thereby be affected."

The foregoing case of the *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, and the reasoning of the court, seem to be closely in point with the case at bar. In both cases the owners cause water to rise from the earth, to become foul, and then to be carried by an artificial drain and discharged into a running stream, the natural watercourse of the basin or valley in which the water rises, and into which stream the water would naturally flow if left to itself; in both cases the owners were engaged in a lawful and necessary work, of great advantage to mankind at large, and particularly to the community in which they operated, the one in mining out of the earth and distributing coal for heating and industrial uses, and the other in also taking out of the earth mineral water for healing and curing the infirm; both were free from fault or negligence in conducting their business, and in avoiding, <sup>564</sup> so far as possible, all injury to others, the injury in each case being but the necessary incident of a lawful business; in each case there was no other place but the stream for the water to go, so that if it were unlawful to discharge the water into the stream, then the enterprise itself, of necessity, would be at a standstill, and a lawful business thus come to an end because it could not be lawfully carried on.

It would seem that the decisions show that when a business is dangerous, unhealthful, or otherwise greatly injurious to a community or to an individual, and it is possible to avoid the injury by a more careful management, or even, if necessary, by a removal of the works to a more secluded or less objectionable place, then the owners of the noxious business will be mulcted in damages, and if necessary restrained by the courts.

We have seen that in the case of *Parker v. Larsen*, 88 Cal. 236, 21 Am. St. Rep. 30, when it appeared that the defendant could flow water from his artesian wells over his fields without injury to his neighbor, but did not do so, he was enjoined.

In the case of *Indianapolis Water Co. v. American Straw Board Co.*, 53 Fed. Rep. 970, where there was a discharge of refuse matter from a straw board factory into a non-navigable river, used by a water company as a source of supply for furnishing a city with water for domestic and other purposes, it was held that injunction would lie to restrain such pollution of the water supply.

In *Kinnaird v. Standard Oil Co.*, 89 Ky. 468, 25 Am. St. Rep. 545, defendant had stored petroleum, which leaked and percolated through the ground until it reached plaintiff's spring of water. *Ottawa Gas etc. Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263, was a similar case, the offensive substances percolating from the gasworks into plaintiff's well. Also *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257. Either of two courses could <sup>565</sup> have been followed by the offending defendants in these last three cases; they could improve their works so that the oils would not leak and percolate through the earth to the fouling of the water, or they could remove their works to another locality. Accordingly, damages were assessed in each case for the injury.

So of various kinds of dangerous or offensive mills, factories, or other establishments or occupations. If they are conducted in such a manner as to materially and essentially injure adjoining proprietors the owners may be subject to suits for damages, or, in case the injury is continuous, the business may be enjoined. But, in this class of cases, either a change in the method of conducting the business, so as to avoid the injury, or else a total removal of the works to another and safer locality may be had.

But the case before us does not belong to this class. Railroads must reach our cities and the marts of trade; they cannot do business elsewhere. Mines and mineral springs, natural gas and oil wells cannot be removed; they must be operated where they are, or totally abandoned. Where, therefore, a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected; and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation. It is then a case in which the interests and convenience of the individual must give way to the general good.

The demurrer to the second paragraph of the answer in this case admits the facts stated in the answer to be true. We have then to consider the statements of the <sup>566</sup> answer as facts, and in the light of these facts examine whether the business of appellants is a lawful business, and whether it is

carried on with due care and so as to do no injury to appellee which can reasonably be avoided.

From the answer, then, we learn that said artesian well was dug, and its waters caused to flow upon appellant's said lands by an association of the citizens of Martinsville, with the assent and approval of appellee; that the waters from said well flowed into a stream which, after running through said city, passed over the lands of appellee, and for more than a year so continued to flow with the acquiescence of appellee; that the only means or way of escape of the water from said well is in and along said branch, which is the only natural outlet for the same, and that the increase of the flow of water in said stream was not materially increased by the water from said artesian well; that afterward, by scientific analysis and by the use of said water for drinking and bathing, it was discovered that the waters were of great medicinal value, and possessed of curative properties in the healing of persons afflicted with rheumatism, neuralgia, paralysis, kidney affections, and various other diseases; that thereupon, for the purpose of utilizing said waters in the cure of persons so sick and afflicted, appellants erected upon their said lots a bath-house at a cost of ten thousand dollars, in which they have since continued to treat those affected as aforesaid, using said waters.

It would seem, from these statements, that the business in which appellants are engaged is a lawful one. They sunk, or permitted to be sunk, on their own land an artesian well. This they had a perfect right to do, and in addition it would appear that this work was done with the help of many citizens of the town, and with the acquiescence of appellee as well. Such help and acquiescence, however, were not necessary to make the act of <sup>567</sup> sinking the well lawful. It appears that the stream into which the waters flowed naturally from the well is a spring branch, which passes directly through the city before it reaches either the land of appellants or that of appellee. This stream is not only the natural outlet for the drainage of said lands, but is the only means or way of escape of said artesian water.

But was it lawful to build a sanitarium for the cure of the sick, and to bathe in the waters those afflicted with disease? It was certainly lawful to do so, provided the sanitarium is properly conducted and well managed, so as to do no injury to any person which, reasonably and with due care, can be

avoided. This court has already said: "Hospitals and homes for the sick are very far from being nuisances *per se*. They are wise and beneficent charities, to be fostered and encouraged by liberal legislation, and not to be suppressed, or even discouraged, by what may seem to be harsh or restrictive laws": *Bessonies v. City of Indianapolis*, 71 Ind. 189.

But was due care exercised in the construction and management of the sanitarium, and in the drainage of the waters therefrom? The answer states: That in erecting said bath-house and in using said waters for the healing of persons, as aforesaid, and in all that appellants did in the use of said waters and the draining of the same away, appellants used all proper and possible care to avoid injury, damage, or inconvenience to appellee and all others, and only did such acts as were proper and necessary to be done in the use of said waters for the purposes aforesaid; that, after erecting said bath-house, appellants placed under ground a drain made of porous tile to convey the surplus water from said artesian well under ground to the branch above appellee's land, because said branch was the only natural and only convenient outlet for said water.

568 It would seem, therefore, that all due care has been exercised in the premises, and that the business is lawful, and that it is conducted in a lawful manner.

It is a question, also, whether appellee, having stood by and assented to and acquiesced in the expenditure of said sum of ten thousand dollars in the erection of said bath-house, is not now estopped from seeking to enjoin the continuation of its use. For over a year before this she had also acquiesced in the flowing of the artesian water into the stream, and now she could hardly be ignorant of the purpose for which the sanitarium was to be used.

This court has held that under certain circumstances, by remaining silent and allowing acts to be done and expense to be incurred, persons may lose their remedy by injunction, and be compelled to assert their rights at law: *City of Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 109, and authorities there cited.

In New Jersey it was held that if a person "has given his consent, either expressly or impliedly, to the erection of expensive works, he cannot afterwards enjoin their operation, though they prove more annoying or injurious than he anticipated": *Hulme v. Shreve*, 4 N. J. Eq. 116.

We think the facts stated in the second paragraph of the answer sufficient.

The judgment is reversed, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings not inconsistent with this opinion.

ON PETITION FOR A REHEARING.

HOWARD, J. Counsel for appellee earnestly refer us to the provisions of the statute, section 658 of the Revised Statutes of 1881, <sup>569</sup> forbidding the reversal of a judgment when it shall appear to the court that the merits of the case have been fairly tried and determined, and contend that the judgment in this case should be allowed to stand, and so prevent further litigation.

If, indeed, it should appear to the court that the merits of this case had been fairly tried and determined, it would be our duty to affirm the judgment, but the trial court having sustained a demurrer to the affirmative matter set up in the answer, we are left unable to say whether appellants were harmed by the rulings. It is only when the allegations of a proper paragraph of pleading may be established by proof under other paragraphs that the sustaining of a demurrer to the paragraph in question will be held harmless. By its ruling on the demurrer, in this instance, the court has said that the facts stated in the answer, even if true, would not constitute a good defense to the action. Under this ruling, also, the affirmative paragraph of the answer was, in effect, stricken out, and the appellants had no right to offer proof to sustain its allegations. "Nor," as said in *Wilson v. Town of Monticello*, 85 Ind. 10, "would it be just to a defendant, who has put in a valid plea, to hunt through the evidence to ascertain whether he was or was not injured, for he is entitled to the benefit of the explicit admission made by the demurrer": See, also, *Pennsylvania Co. v. Poor*, 103 Ind. 553; *Fleetwood v. Brown*, 109 Ind. 567; *Rush v. Thompson*, 112 Ind. 158.

Counsel intimate further that it could be shown that the allegations made in the answer are not in fact true, and that appellants could have obtained an outlet by constructing a drain to another stream, and so have avoided injury to appellee.

In answer to this, "it may be asked," as said in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445, "where, short <sup>570</sup> of the sea, might the sewer be discharged that the same complaint might not be made?"



However that may be, appellee is in no condition to make such contention against the answer. If the averments of the answer were believed to be untrue, they should have been replied to, and the truth of the matter alleged to be thus put in issue and determined: *Gilmore v. McClure*, 133 Ind. 571.

Instead of this, however, appellee chose to demur to the answer, and thus to admit the truth of the facts therein pleaded. The facts alleged being thus admitted, the appellants ought to have judgment.

We do not wish to be understood as holding that appellants were authorized, by artificial means, to conduct the waters from their spring into the stream upon appellee's land, unless the said waters would have naturally flowed into said stream without such artificial aid; and it was upon this interpretation of the answer that the opinion was written.

The petition for a rehearing is overruled.

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**RIGHT OF RIPARIAN PROPRIETOR TO CORRUPT WATER TO THE INJURY OF OTHERS:** See *Helfrich v. Catonsville Water Co.*, 74 Md. 269; 28 Am. St. Rep. 245, and note.

**RIGHT TO AND MEASURE OF DAMAGES FOR POLLUTION OF STREAM:** See *Lewis v. Carnegie*, 145 Pa. St. 612; 27 Am. St. Rep. 717, and note; *Mississippi Mills Co. v. Smith*, 69 Miss. 299; 30 Am. St. Rep. 546.

**INJUNCTION TO RESTRAIN POLLUTION OF WATER WILL BE GRANTED, WHEN:** See *Barton v. Union Cattle Co.*, 28 Neb. 350; 26 Am. St. Rep. 340, and note.

**DOCTRINE OF LACHES AS APPLIED TO INJUNCTIONS:** See note to *Bell v. Hudson*, 2 Am. St. Rep. 802, 803.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**HUNT v. IOWA CENTRAL RAILWAY COMPANY.**

[38 IOWA, 15.]

**APPELLATE PRACTICE.—ALL ERRORS OF LAW** arising upon a trial to which proper and timely exceptions are taken may be reviewed on appeal without having been embodied in a motion for a new trial.

**APPELLATE PRACTICE—APPEAL PENDING MOTION FOR NEW TRIAL.—**The pendency of a motion for a new trial at the time an appeal is taken does not in any manner invalidate the appeal nor prevent the appellate court from giving the same consideration to errors properly raised by it as it might do had no motion been filed.

**EMINENT DOMAIN—DAMAGES.—**In assessing damages to a landowner for a right of way taken by a railroad company regard is had only to the immediate consequences of the appropriation. The owner is not, in such proceedings, compensated for damages which may thereafter result from negligent acts of the company committed after it makes the appropriation.

**EMINENT DOMAIN—SUBSEQUENT DAMAGES—OVERFLOW OF LANDS.—**Damages suffered by a landowner from an overflow of surface water discharged upon his land through the negligence of a railway company in constructing its roadbed are not included in the price paid by the company for its right of way.

**DAMAGES FROM OVERFLOW OF LANDS—STATUTE OF LIMITATIONS.—**When the first overflow of lands, arising from the negligent discharge of surface water thereon, which causes damage, furnishes no safe or substantial basis from which future damages accruing from year to year from the same cause can be calculated, the right of action is not barred by limitation, though such first overflow occurred more than five years prior to the commencement of suit.

**NUISANCE—RAILROADS LIABILITY OF FOR.—**A railroad company, as the grantee and successor of another railway company which has maintained a nuisance, is liable for damages arising from its continuance, of which it had sufficient notice.

**DAMAGES FROM OVERFLOW OF LANDS—EVIDENCE.—**When, in an action against a railroad company to recover damages for negligently overflowing lands by a discharge of surface water thereon in April and May,

1889, deeds in evidence show that the company acquired title to the road in December, 1888, the exclusion of evidence offered by the company to show that a receiver, through whom it acquired title, and who had formerly been operating the road, made his final settlement with the court in May, 1889, and that it did not come into possession of the road until after the latter date, if error, is without prejudice.

**DAMAGES FROM OVERFLOW OF LANDS—ELEMENTS OF DAMAGE.**—In an action to recover damages for an overflow of land caused by the negligent discharge of surface water thereon, recovery may be had for deposits of earth, clay, and like substances naturally resulting from such overflow, although such items of damage are not specially pleaded.

*A. C. Daly, T. F. Bradford, and D. N. Sprague, for the appellant.*

*Newman and Blake, for the appellee.*

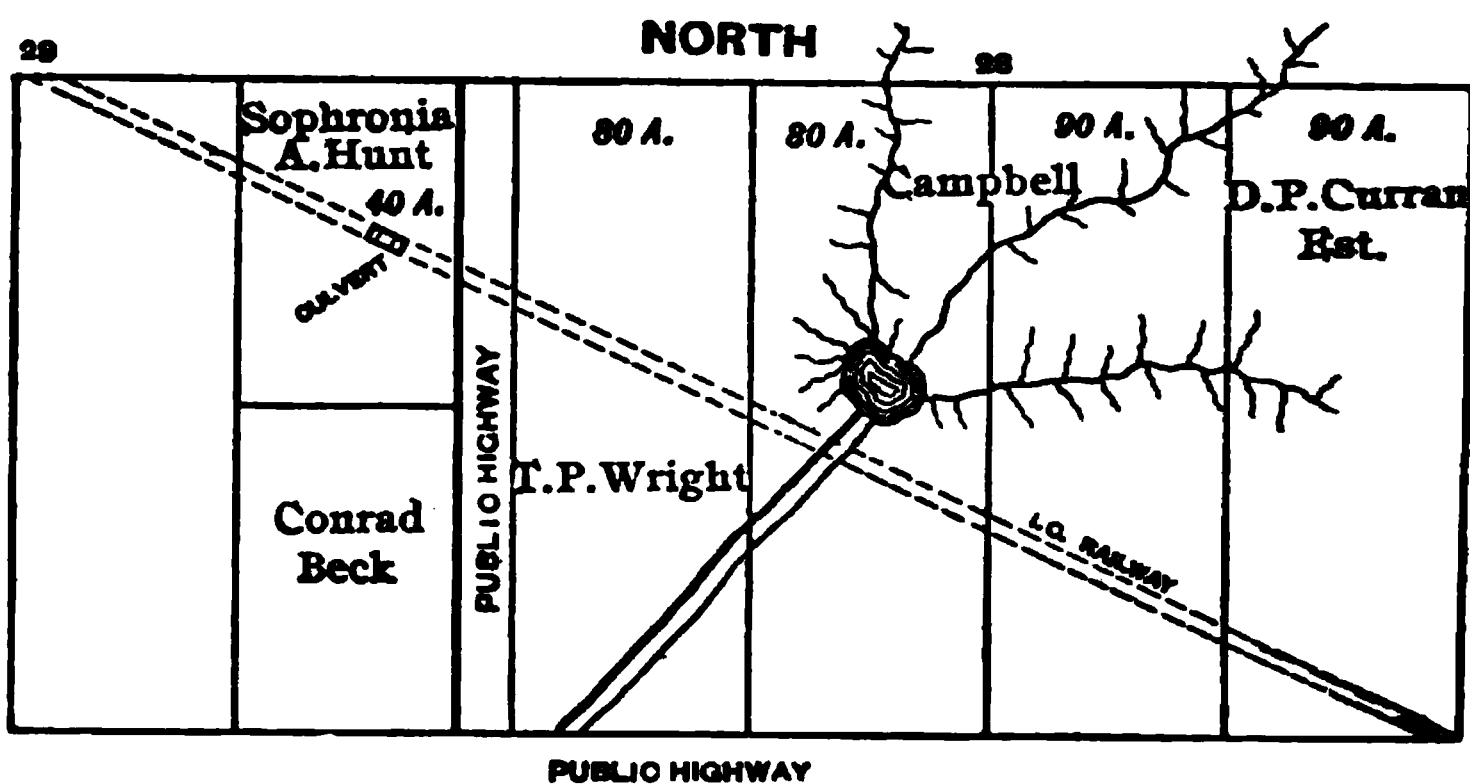
<sup>16</sup> KINNE, J. The plaintiff is the owner of forty acres of land in Louisa county. She claims that the defendant, owning and operating its line of railway through said county and across her land, has on its right of way a ditch on the north side of its roadbed, commencing a mile southeasterly from the plaintiff's land, and by means of which surface water from land lying east of the plaintiff's is conveyed upon her land, and accumulates and stands upon the same in large quantities, submerging the same; that the defendant has provided no means of escape for the water so accumulating; that formerly said surface water did not flow from lands east of the plaintiff's over and upon her land, but since the same has been diverted by <sup>17</sup> said ditch, and, for two years past, by said means, it has been gathered and conducted upon her lands, destroying her crops, and rendering her land untillable, and greatly depreciating its value; that said damage and injury was the result of such ditch; that the water conducted on said land by said ditch submerged about three acres per year on an average, since the building of the road, and the water has been diverted as aforesaid most of the years since the road was built. The last two years the land overflowed three times. The defendant denies generally, and pleads that the road was constructed in 1881 by the Chicago, Burlington, and Pacific Railroad Company, and the ditch complained of was then built by digging and taking earth from the sides, and throwing it up in the center for the embankment upon which the ties and rails were laid, and that all damages arising out of its construction were paid for when the right of way was acquired; that the defendant has been in possession and ownership of said railway from June 1,

1889, having purchased it in the same condition it was in (at the time of the commencement of this action), at a foreclosure sale ordered by the circuit court of the United States for the southern district of Iowa, in a case then pending therein, wherein the Central Trust Company of New York was the plaintiff, and the Central Iowa Railway Company the defendant; the latter company being the grantee of the Chicago, Burlington, and Pacific Railroad Company, and no notice was given the defendant at any time to reform or abate the said ditch; that at the time of building said railway and the making of said ditch the plaintiff did not own said premises; that plaintiff could, at a moderate expense, have relieved her land of the accumulation of water, and prevented the injury in whole or in part; and that the alleged cause of action set out in the plaintiff's petition did not accrue at any time within five years next before she began her action.

<sup>18</sup> 1. It appears in this case that judgment was entered against the defendant at once on the coming in of the verdict; that afterwards, and on November 12, 1890, it filed its motion for a new trial. This motion was taken under advisement by the court. February 2, 1891, it perfected its appeal to the supreme court. April 3, 1891, the motion for a new trial was submitted, and the court refused to pass upon the same, holding it had no jurisdiction, the cause having been appealed. April 8, 1891, the defendant undertook to appeal from the refusal of the court to pass upon the motion. The appellee now moves to dismiss the appeal, claiming that as the case had not been finally disposed of by the district court at the time the appeal was taken, and as the defendant filed a motion for a new trial in that court, he is precluded from appealing. Our statute provides that "the supreme court may review and reverse on appeal any judgment or order of the district court, although no motion for a new trial was made in such court": Code, sec. 3169; *Drefahl v. Tuttle*, 42 Iowa, 177; *Brown v. Rose*, 55 Iowa, 734; *Presnall v. Herbert*, 34 Iowa, 539; *Beems v. Chicago etc. Ry. Co.*, 58 Iowa, 150. From these, and other cases that might be cited, it is clear that all errors at law arising upon the trial, and to which proper and timely exceptions are taken, may be reviewed on appeal by this court without having been embodied in a motion for a new trial. It is also certain that the pendency of a motion for a new trial at the time an appeal is taken will not in any manner invalidate the appeal or prevent this court

giving the same consideration to errors properly raised by it and on the trial, as it might do had no motion been filed: *Brown v. Ross*, 55 Iowa, 734. The motion to dismiss will be overruled.

2. The appellant insists that all the damages sued <sup>19</sup> for in this action are such as, in the contemplation of the law, would be included in the amount paid for the right of way. The plat below will show the course of the railroad, the situation of the lands with reference thereto, the course of the surface water before the railroad was built, and the point where the water is discharged upon the plaintiff's land.



Prior to the erection of the railroad embankment there was a natural depression in the ground, which formed an outlet for surface water on the west eighty of Campbell's land. A culvert was placed at that point. A ditch also existed between the Hunt and Wright lands in the highway separating them. This highway ditch caught most of the surface water east of the same, and which fell on the west part of the Wright land, and the Campbell outlet furnished a place of escape for all surface water falling upon Curran's land, Campbell's land, and the west part of Wright's, as also adjoining lands. It would appear, then, from the testimony that, prior to the building of the railroad, no surface water which fell east of the Hunt land afterwards passed on or over it. At the point where the Campbell outlet was, the railroad company put in a tile culvert under its track. The ditch on the north side <sup>20</sup> of the railroad embankment washed out deeper than the tile, and in time the company lowered this tile culvert, but the opening being too small to permit all the water

to pass through, part of it ran along the ditch, and again washed below the tile culvert, so that this culvert was useless as a waterway. The highway ditch already spoken of, and which, before the railroad was built, carried off the water from the Wright land, since the building of the road has ceased to do so, as the railroad ditch where it crosses it is lower than the highway ditch, and the former carries all water which formerly emptied into said highway ditch, as well as that gathered in the highway ditch. So all the water is carried along and emptied upon the Hunt land. It passes through a culvert on the Hunt land about thirty rods west of the east line. Some three hundred feet west of this culvert the water in the ditches runs west until it empties into a natural outlet. But from a point three hundred feet west of the Hunt culvert the water runs east and passes through it. It appears that, after the notice was served upon the defendant, it, at an expense of eight dollars, built a dam across its ditch on the north side of its track, and a little to the west of the Campbell culvert, which now forces all the water naturally accumulating there to pass through said culvert, thereby preventing the overflowing of the Hunt lands.

From these facts we think it is clear that the damage sued for herein cannot be said to have been considered and settled for in the condemnation proceedings. We have examined the cases cited by counsel for the appellant, and we think they do not support his contention. In principle this case is not different from *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 302, 308; 50 Am. Rep. 746; *Sullens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 665; 7 Am. St. Rep. 501. It is well settled that, in assessing damages to the landowner for right of way taken, <sup>21</sup> regard is had only to the immediate consequences of the appropriation. The owner is not, in such proceedings, compensated for damages which may thereafter result from negligent acts of the company committed after it makes the appropriation: *Fleming v. Chicago etc. Ry. Co.*, 34 Iowa, 353; *King v. Iowa Midland R. R. Co.*, 34 Iowa, 458; *Miller v. Keokuk etc. Ry. Co.*, 63 Iowa, 680, 685. The plaintiff's grantors had a right to presume, when they conveyed the land to the company that built the road, that the work of constructing the road would be properly done; that sufficient culverts for the passage of surface water at proper places would be put in and maintained. The evidence shows that, with a suitable culvert, properly taken care of, at the Campbell outlet, no

damage would have ensued to the plaintiff. By neglect and carelessness on part of the defendant surface water from several hundred acres of land, and which never before passed over her land, was gathered in the ditches of the defendant, carried along, and finally discharged upon her land. Damages arising from such an act have never been held to be included in the price paid for right of way. The cases cited are decisive of this question upon the facts disclosed by this record.

3. It is contended that this action is barred by the statute of limitations; that the action accrued more than five years prior to the commencement of this suit. It must be conceded that the water conducted upon the plaintiff's land submerged several acres of the land for nearly every year since the road was built. Such is the allegation in the petition, and the evidence sustains it. The Hunt and Campbell culverts were put in in 1882, and the situation of the ditch and Hunt culvert has been substantially the same ever since they were constructed, except the ditch has washed out and become deeper. It also appears that this surface water <sup>22</sup> was not discharged upon the Hunt land every year; it depended upon the season, the amount of rainfall, and the quantity which fell at one time. In other words, the overflow was not constant, it was not continuing in the sense of occurring each year. It was entirely dependent upon circumstances. At one time the overflow might be slight, and beneficial to the land; at another it might be great and occasion much damage. It would appear, then, that the first overflow which occasioned damage would furnish no safe or substantial basis from which future damages could be calculated. The learned counsel for the appellant relies upon the case of *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792. That case is, to our minds, clearly distinguishable from this one. In the Powers case the whole injury was regarded as having occurred at one time, and that time being more than five years prior to the commencement of the suit, it was held to be barred. The injury was of such a character as to be beyond the defendant's power to remedy. It would be compelled to go onto the lands of others to erect barriers to prevent the damage. In this case the remedy, as shown by the evidence, is in the defendant's own hands, by work done upon its own land: *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 302, 309; 50 Am. Rep. 746; *Miller v. Keokuk etc. Ry. Co.*, 63 Iowa,



680, 683. Again it is clear that the plaintiff herein could not have maintained an action until some actual injury was caused to her by the diversion of the water by the defendant. There is here no claim of any such injury until 1888—less than two years prior to the commencement of this action. True, the evidence shows various overflows of the plaintiff's land prior to that, but, if they caused any injury, no damage is claimed for it: *Powers v. Council Bluffs*, 45 Iowa, 652; 24 Am. Rep. 792; *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 302, 309; 50 Am. Rep. 746; *Miller v. Keokuk etc. Ry. Co.*, 63 Iowa, 680, 684; *Drake v. Chicago etc. Ry. Co.*, 70 Iowa, 59, 63; *Sul-lens v. Chicago etc. Ry. Co.*, 74 Iowa, 659, 666; 7 Am. St. Rep. 501. The same doctrine is recognized in *Haisch v. Keokuk etc. Ry. Co.*, 71 Iowa, 606, 608. The action is not barred.

4. It is contended that, inasmuch as the defendant came into possession of the railway as grantee from another, long after the nuisance, if any, existed, it is not liable for damages arising from its continuance until its attention is called to it, and it is asked to abate it. Without deciding this question, we may say the evidence shows that defendant had sufficient notice, and took no steps to prevent the damage until after this action was commenced.

5. Certain deeds were introduced in evidence by the defendant, showing that it acquired title to the property in December, 1888; also a decree of the United States circuit court of date May 28, 1889, at which time it is apparent the receiver who had formerly been operating the road made his final settlement with the court. The defendant contends it did not come into actual possession of the road until May 30, 1889—two days after this decree was entered. It introduced evidence showing such fact, but it was stricken out by the court on the theory that it contradicted the written proof in evidence. While it is not entirely clear from this record, yet we think the jury might fairly presume that, inasmuch as the defendant received a deed to the railroad, and filed it in December, 1888, and as the decree of the United States circuit court shows that the receiver's duties, "save as to accounting and being discharged, have ceased," that the defendant was in possession of the railroad at and prior to the overflow in April and May, 1889, and the striking out of the evidence, if error, was without prejudice.

6. The defendant asked the court to give an <sup>24</sup> instruction as follows: "19. The jury are instructed that there is no

claim made by the plaintiff for any sediment or deposit carried on the land by any act of the defendant, for, under the issues as made in the pleadings, no such claim is made, and therefore it must not be taken into consideration in determining your verdict." It was refused by the court, and, upon this, error is assigned. The defendant's theory is that evidence touching the deposit of earth, clay, and other materials upon the plaintiff's land by the overflow of the water, not being specially pleaded, should have been excluded. The petition, it is true, did not in terms complain of such deposits, but the action was for damages carried to the plaintiff's land by the wrongful diversion of surface water by the defendant and its discharge upon the plaintiff's land. The depositing of earth, clay, and the like substances were the usual and probably necessary results of the overflow complained of. It would be inconceivable how a large quantity of water could be discharged from the defendant's ditch upon the plaintiff's land, which had the effect of making the channel of the defendant's ditch deeper, without carrying more or less of the deposit onto the plaintiff's land. Clearly, then, whatever was the natural, if not necessary, result of the overflow, as the deposits made by it on the plaintiff's land, must be held to be within the allegations made in the petition, and evidence as to such deposits was properly admitted.

7. We cannot consider questions for the first time raised on the motion for a new trial, as they are not brought up by this appeal, which is not taken from a ruling upon said motion. Many other errors are assigned. We have considered them all, and find nothing prejudicial to the defendant. The judgment of the district court is affirmed.

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**EMINENT DOMAIN—DAMAGES.**—Where property is seized by a railroad company under eminent domain proceedings damages cannot be recovered for consequential injuries sustained from using and constructing the road, unless compensation is provided for by statute: See note to *Sheehy v. Kansas City etc. Ry. Co.*, 4 Am. St. Rep. 399. Direct and immediate damages are alone recoverable: See notes to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 145; *Wabash etc. Ry. Co. v. McDougall*, 9 Am. St. Rep. 546. The company is liable for injuries occasioned by its structure and arising from causes which might have been foreseen, but not for injuries growing out of remote and uncertain consequences which could not be anticipated: *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127; 36 Am. St. Rep. 359.

**EMINENT DOMAIN.**—DAMAGES recoverable of railway company for overflowing land, although its right to maintain structures has first been secured by proceedings in eminent domain: See notes to *Sheehy v. Kansas City etc. Ry.*

*Co.*, 4 Am. St. Rep. 403; *Ohio etc. Ry. Co. v. Wachter*, 5 Am. St. Rep. 533; *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127; 36 Am. St. Rep. 359, and note.

NUISANCE.—STATUTE OF LIMITATIONS IN ACTIONS FOR: See monographic note to *St. Louis etc. Ry. v. Biggs*, 20 Am. St. Rep. 176-179.

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## GODDARD v. WINCHELL.

[86 IOWA, 71.]

**AEROLITES—OWNERSHIP.**—An aerolite becomes part of the soil on which it falls and in which it is imbedded, and is the property of the owner of such soil, and not of another who finds it, digs it up, and removes it.

*Charles B. Elliott and C. H. Kelley*, for the appellant.

*W. E. Bradford and Peters and Fisher*, for the appellee.

80 GRANGER, J. The district court found the following facts, with some others, not important on this hearing: "1. That the plaintiff, John Goddard, is, and has been since about 1857, the owner in fee simple of the north half of section No. 3, in township No. 28, range No. 25, in Winnebago county, Iowa, and was such owner at the time of the fall of the meteorite hereinafter referred to; 2. That said land was prairie land, and that the grass privilege for the year 1890 was leased to one James Elickson; 3. That on the second day of May, 1890, an aerolite passed over northern and northwestern Iowa, and the aerolite, or fragment of the same, in question in this action, weighing, when replevied, and when produced in court on the trial of this cause, about sixty-six pounds, fell onto the plaintiff's land, described above, and buried itself in the ground to a <sup>81</sup> depth of three feet, and became imbedded therein at a point about twenty rods from the section line on the north; 4. That the day after the aerolite in question fell it was dug out of the ground with a spade by one Peter Hoagland, in the presence of the tenant, Elickson; that said Hoagland took it to his house, and claimed to own same, for the reason that he had found same and dug it up; 5. That on May 5, 1890, Hoagland sold the aerolite in suit to the defendant, H. V. Winchell, for one hundred and five dollars, and the same was at once taken possession of by the said defendant, and that the possession was held by him until same was taken under the writ of replevin herein; that the defendant knew at the time of his purchase that it was an aerolite, and that it fell on the prairie south of Hoagland's land; . . . 10. I find the

value of said aerolite to be one hundred and one dollars (\$101) as verbally stipulated in open court by the parties to this action; that the same weighs about sixty-six pounds, is of a black, smoky color on the outside, showing the effects of heat, and of a lighter and darkish gray color on the inside; that it is an aerolite, and fell from the heavens on the 2d of May, 1890; that a member of Hoagland's family saw the aerolite fall, and directed him to it."

As conclusions of law the district court found that the aerolite became a part of the soil on which it fell; that the plaintiff was the owner thereof; and that the act of Hoagland in removing it was wrongful. It is insisted by the appellant that the conclusions of law are erroneous; that the enlightened demands of the time in which we live call for, if not a modification, a liberal construction, of the ancient rule "that whatever is affixed to the soil belongs to the soil," or, the more modern statement of the rule, that "a permanent annexation to the soil of a thing in itself personal <sup>82</sup> makes it a part of the realty." In behalf of the appellant is invoked a rule alike ancient and of undoubted merit—that of "title by occupancy"—and we are cited to the language of Blackstone, as follows: "Occupancy is the taking possession of those things which before belonged to nobody"; and "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things, and therefore they belong, as in a state of nature, to the first occupant or finder." In determining which of these rules is to govern in this case it will be well for us to keep in mind the controlling facts giving rise to the different rules, and note wherein, if at all, the facts of this case should distinguish it. The rule sought to be avoided has alone reference to what becomes a part of the soil, and hence belongs to the owner thereof, because attached or added thereto. It has no reference whatever to an independent acquisition of title, that is, to an acquisition of property existing independent of other property. The rule invoked has reference only to property of this independent character, for it speaks of movables "found upon the surface of the earth or in the sea." The term "movables" must not be construed to mean that which can be moved, for, if so, it would include much known to be realty; but it means such things as are not naturally parts of earth or sea, but are on the one or in the

other. Animals exist on the earth and in the sea, but they are not, in a proper sense, parts of either. If we look to the natural formation of the earth and sea it is not difficult to understand what is meant by "movables," within the spirit of the rule cited. To take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, <sup>83</sup> as we witness it in our daily observations, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables.

If, from what we have said, we have in mind the facts giving rise to the rules cited, we may well look to the facts of this case to properly distinguish it. The subject of the dispute is an aerolite, of about sixty-six pounds' weight, that "fell from the heavens" on the land of the plaintiff, and was found three feet below the surface. It came to its position in the earth through natural causes. It was one of nature's deposits, with nothing in its material composition to make it foreign or unnatural to the soil. It was not a movable thing "on the earth." It was in the earth, and in a very significant sense immovable; that is, it was only movable as parts of earth are made movable by the hand of man. Except for the peculiar manner in which it came, its relation to the soil would be beyond dispute. It was in its substance, as we understand, a stone. It was not of a character to be thought of as "unclaimed by any owner," and, because unclaimed, "supposed to be abandoned by the last proprietor," as should be the case under the rule invoked by the appellant. In fact, it has none of the characteristics of the property contemplated by such a rule.

We may properly note some of the particular claims of the appellant. His argument deals with the rules of the common law for acquiring real property, as by escheat, occupancy, prescription, forfeiture, and alienation, which it is claimed were all the methods known, barring inheritance. We need not question the correctness of the statement, assuming that it has reference to original acquisition, as distinct from acquisitions to soil already owned, by accretion or natural causes. The general rules of the law, by which the owners of riparian titles are made to lose or gain <sup>84</sup> by the doctrine of accretions, are quite familiar. These rules are not, however, of exclusive application to such owners. Through the action

of the elements, wind and water, the soil of one man is taken and deposited in the field of another; and thus all over the country, we may say, changes are constantly going on. By these natural causes the owners of the soil are giving and taking as the wisdom of the controlling forces shall determine. By these operations one may be affected with a substantial gain, and another by a similar loss. These gains are of accretion, and the deposit becomes the property of the owner of the soil on which it is made.

A scientist of note has said that from six to seven hundred of these stones fall to our earth annually. If they are, as indicated in argument, departures from other planets, and if among the planets of the solar system there is this interchange, bearing evidence of their material composition, upon what principle of reason or authority can we say that a deposit thus made shall not be of that class of property that it would be if originally of this planet, and in the same situation? If these exchanges have been going on through the countless ages of our planetary system, who shall attempt to determine what part of the rocks and formations of especial value to the scientist, resting in and upon the earth, are of meteoric acquisition, and a part of that class of property designated in argument as "unowned things," to be the property of the fortunate finder instead of the owner of the soil, if the rule contended for is to obtain? It is not easy to understand why stones or balls of metallic iron, deposited as this was, should be governed by a different rule than obtains from the deposit of boulders, stones, and drift upon our prairies by glacier action; and who would contend that these deposits from floating bodies of ice belong, not to the owner of the soil, but to the finder? Their origin or source may be less mysterious, but they, too, are "telltale messengers" from far off lands, and have value for historic and scientific investigation.

It is said that the aerolite is without adaptation to the soil, and only valuable for scientific purposes. Nothing in the facts of the case will warrant us in saying that it was not as well adapted for use by the owner of the soil as any stone, or as the appellant is pleased to denominate it, "ball of metallic iron." That it may be of greater value for scientific or other purposes may be admitted, but that fact has little weight in determining who should be its owner. We cannot say that the owner of the soil is not as interested in, and would not as

readily contribute to, the great cause of scientific advancement as the finder, by chance or otherwise, of these silent messengers. This aerolite is of the value of one hundred and one dollars, and this fact, if no other, would remove it from uses where other and much less valuable materials would answer an equally good purpose, and place it in the sphere of its greater usefulness.

The rule is cited, with cases for its support, that the finder of lost articles, even where they are found on the property, in the building, or with the personal effects of third persons, is the owner thereof against all the world, except the true owner. The correctness of the rule may be conceded, but its application to the case at bar is very doubtful. The subject of this controversy was never lost or abandoned. Whence it came is not known, but, under the natural law of its government, it became a part of this earth, and, we think, should be treated as such. It is said by the appellant that this case is unique, that no exact precedent can be found, and that the conclusion must be based largely upon new considerations. No similar question has, to our knowledge, been determined in <sup>86</sup> a court of last resort. In 15 American and English Encyclopedia of Law, page 388, is the following language: An aerolite is the property of the owner of the fee upon which it falls. Hence a pedestrian on the highway, who is first to discover such a stone, is not the owner of it; the highway being a mere easement for travel." It cites the case of *Maas v. Amana Society*, 16 Alb. L. J. 76, and 13 Ir. L. T. 381, each of which periodicals contains an editorial notice of such a case having been decided in Illinois, but no reported case is to be found. Anderson's Law Dictionary states the same rule of law, with the same references, under the subject of "Accretions." In 20 Alb. L. J. 299 is a letter to the editor from a correspondent, calling attention to a case determined in France, where an aerolite found by a peasant was held not to be the property of the "proprietor of the field," but that of the finder. These references are entitled, of course, to slight, if any, consideration, the information as to them being too meager to indicate the trend of legal thought.

Our conclusions are announced with some doubts as to their correctness, but they arise not so much from the application of known rules of law to proper facts as from the absence of defined rules for these particular cases. The interest manifested has induced us to give the case careful thought. Our



conclusions seem to us nearest analogous to the generally accepted rules of law bearing on kindred questions, and to subserve the ends of substantial justice. The question we have discussed is controlling in the case, and we need not consider others.

The judgment of the district court is affirmed.

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**PROPERTY IN AEROLITES.**—The question presented in this case is not only one of much interest, but seems not to have been elsewhere considered.

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## LEON LOAN AND ABSTRACT COMPANY v. EQUALIZATION BOARD OF LEON.

[86 IOWA, 127.]

**TAXATION—ABSTRACT BOOKS.**—A set of books containing written abstracts of the titles to real estate, used as a means of profit and having a market value, are not exempt from taxation, because of their being in manuscript.

**ACTION** upon an agreed case to determine whether a set of abstract books containing abstracts of the titles to lands in a county as taken from the county records are subject to taxation or not. Judgment for defendant. Plaintiff appealed.

*Harvey and Parrish*, for the appellant.

*C. W. Hoffman*, for the appellee.

**123 GRANGER, J.** The legal question involved is important. The books are admitted to have "an actual market value," and for the purpose of "learning title to lands in Decatur county," they "can be used by any one of ordinary intelligence and ability." It is also admitted "that they contain a true, full, and complete record of the title of each tract of land and town lot in Decatur county, Iowa." The books have an admitted value of six thousand dollars; have changed hands as articles of commerce; are kept in an office building as the basis of a business for profit by the receipt of fees for transcripts of their contents; and their value consists chiefly in their being correct compilations from public records, and not because their contents are emanations from the learning or genius of an individual.

The revenue law of the state makes certain exemptions of property from taxation, but there is no claim that they em-

brace books of this character. By section 801 of the code it is provided that "all other property, real and personal, is subject to taxation in the manner directed." These books are personal property. They embody the qualities of such property in a marked degree. Then, why are they not taxable? This brings <sup>134</sup> us to the grounds urged by the appellant against such taxation. It is said: "These books being manuscripts, the law which applies to manuscripts would apply to these abstract books." Again, it is said that they "answer the definition of 'manuscript,' being books written with the hand." We must not be understood as committing ourselves to any view of the law relative to the liability of authors' manuscripts being taxable under our statutory provisions. For the purposes of the case we may say they are not.

The appellant cites and relies largely for support in its position upon the holding of the supreme court of Michigan in the case of *Perry v. City of Big Rapids*, 67 Mich. 146, 11 Am. St. Rep. 570. The decision is by a divided court, and we regret that we find ourselves opposed to the reasoning and conclusions of the majority opinion. Mr. Justice Morse, in a dissenting opinion, reflects what, in our judgment, is the true spirit of the law. The majority opinion takes, to some extent, for its support the holding in the case of *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, in which that court held that "an execution levy made on a set of manuscript abstract books was of no validity, because the right of the proprietor of such a manuscript to publish it or to keep it back from publication is not a property right, but one which is purely incorporeal, and attended with considerations of a nature entirely different from any involved in other rights." The fact that the Dart case has such controlling force in *Perry v. City of Big Rapids*, 67 Mich. 146, 11 Am. St. Rep. 570, leads us to believe the facts of the two cases were substantially alike, as to the character of the abstract books, although the reported cases might leave some doubt in that respect.

The Michigan cases attach great importance to the fact that the proprietor of a manuscript may control or determine whether or not it shall be published, and that, without publication, there is no value as a basis <sup>135</sup> for an assessment or levy. We are unable to understand the application of the thought to the case at bar. In cases of manuscript, designed for publication, their value, in a general property sense may,

be said to be in the published work or the right of publication, for it is then only that it becomes of interest to others than the author. It is when the manuscript is, by the author, put in condition for use that it takes to itself value in a commercial sense. Before publication, or a transfer of the right of publication by the author, the manuscript is but a private memorandum or writing, without significance, except to the author, like other private memoranda. When the author places it upon the marts of the world for use or profit a commercial value attaches, and it becomes "property" in the general sense. Before the publication, or the granting of a right to publish, the author's work is incomplete. In the light of a design to publish a work nothing has been produced.

These abstract books answer the original design, are complete, and placed before the public for use and profit. They were not made for publication, in the general sense. Such a publication would defeat the very purpose of their production. Their value consists, chiefly, in their contents being kept from the public. They are the means, in a sense, the instruments for carrying on a business; as much so as are the tools or machinery by which the artisan plies his calling.

Mr. Freeman, in his work on Executions, section 110, referring to the Dart case, after giving the facts and conclusions, says: "The reasoning of this decision does not seem irresistible. In a set of abstract books, or in any other manuscript, we see nothing intangible—nothing which makes it difficult to subject them to execution." The rule as to patents and copyrights, as claimed by the appellant, from the cases of *Stevens v. Cady*, 14 How. 531, and *Stevens v. Gladding*, 17 136 How. 451, whereby they are not subject to seizure on execution because incorporeal in their nature and without existence in any particular place, is not applicable here, for the reason that these books are tangible, have a particular location, and are capable of seizure and delivery. They are more like the engraved plates referred to in the cited cases. It would, to our minds, be a strange perversion of the law to hold that these books, that are transferable from hand to hand of the value of six thousand dollars, and usable by any person of ordinary intelligence and ability, as a means of profit—should be exempt from taxation, merely because their contents are written, and not printed, when, in either case, their use would be the same; or because "they are only valuable for the information they contain, and that information is

conveyed by consultation or extracts," which thoughts seem to have been prominent in *Perry v. City of Big Rapids*, 67 Mich. 146, 11 Am. St. Rep. 570. It may be said that the value of books in general depends on the information they contain, and that such information is derived from consultation; but for such abstract reasons they are no less property, subject to the operation of the revenue laws of the state.

The judgment of the district court is affirmed.

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**ABSTRACT BOOKS AS TAXABLE PROPERTY:** See *Booth v. Phelps*, 8 Wash. 549, 40 Am. St. Rep. 921, and note.

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## **FIRST NATIONAL BANK OF DECORAH v. DISTRICT TOWNSHIP OF DOON.**

[36 IOWA, 330.]

**MUNICIPAL BONDS—FRAUDULENT ISSUE—EVIDENCE OF.**—When, in an action by a *bona fide* holder on bonds of a school district purporting to have been issued in satisfaction of a judgment against it as authorized by statute, the defense is set up that such bonds have been fraudulently issued after the judgment had been satisfied by a prior issue of bonds, the defendant, after showing that a diligent search has been unsuccessfully made for the records of the district, authorizing the first issue of bonds, and the secretary of the district has identified one of such bonds as having been issued in payment of the judgment, and has partly described the others, is entitled to have such bonds, purporting on their face to have been duly issued by the district, and having afterwards been found to be valid obligations against it by a court of competent jurisdiction, admitted in evidence to establish the fraudulent character of the bonds in suit.

**MUNICIPAL BONDS—FRAUDULENT ISSUE—RIGHTS OF BONA FIDE HOLDER.** Bonds fraudulently issued by a school district in satisfaction of a judgment already paid create a new liability against the district, and, when they cause its total indebtedness to exceed the limit fixed by constitutional provisions, a purchaser for value before maturity is charged with notice of that fact, and cannot recover.

**MUNICIPAL BONDS—ISSUE IN EXCESS OF CONSTITUTIONAL LIMIT OF INDEBTEDNESS—NOTICE TO PURCHASER.**—Municipal bonds issued on a contract which creates a debt in excess of constitutional limitations are invalid, and a *bona fide* purchaser is charged with notice that the indebtedness thus created by the corporation is in excess of the amount limited by the constitution.

**MUNICIPAL BONDS—FRAUDULENT ISSUE—PAYMENT OF INTEREST—ESTOPPEL:** When a municipal corporation has no power to issue bonds its acts in levying taxes for their payment and the payment of interest thereon is illegal, and can neither give validity to the bonds nor estop the corporation from asserting their invalidity.

*Wright and Hubbard*, for the appellant.

*A. Van Wagenen and H. G. McMillan*, for the appellee.

**331** ROBINSON, C. J. The following is a copy of one of the bonds in suit:

"No. 5.

\$500.

"UNITED STATES OF AMERICA, STATE OF IOWA, LYON COUNTY.

"The district township of Doon, for value received, promises to pay to James H. Wagner, or order, at treasurer's office in Doon, on the first day of March, 1890, or at any time, after five years, before that date, at the pleasure of the district township, the sum of five **332** hundred dollars, with interest at the rate of ten per cent per annum, payable at the treasurer's office in Doon, semi-annually, on the first days of March and September in each year, on presentation and surrender of the interest coupons hereto attached. This bond is issued by the board of directors of said district township for the purpose of paying off judgments and funding judgment indebtedness, under the provisions of chapter 132, Laws of the Seventeenth General Assembly, and in conformity with a resolution of said board, dated the first day of March, 1880. In witness whereof, the said district, by its board of directors, has caused this bond to be signed by the president of the board, and attested by the secretary, this first day of March, 1880.

J. SHOTSWELL, President.

"T. E. CONVERS, Secretary."

To the bond are attached coupons, of one of which the following is a copy:

"\$25

(No. 20.)

\$25

"The treasurer of the district township of Doon, Iowa, will pay to the bearer hereof, on the first day of March, 1890, at treasurer's office, twenty-five dollars for interest on bond No. 5, issued under provisions of chapter 132, Laws of the Seventeenth General Assembly.

J. SHOTSWELL, President.

"T. E. CONVERS, Secretary."

A certificate attached to the bond is as follows:

"STATE OF IOWA, }  
Lyon County. } ss.

"I, J. M. Webb, auditor of said county, do hereby certify that the annexed bond has been duly registered in my office this seventh day of March, 1880.

J. M. WEBB,

"County Auditor."

**§ 33** On the back of the bond was printed a copy of chapter 132 of Acts of the Seventeenth General Assembly, as follows:

*"Be it enacted by the General Assembly of the state of Iowa:*

**"SECTION 1.** That any school districts against which judgments have been rendered prior to the passage of this act, and which judgments remain unsatisfied, may, for the purpose of paying off such judgments and funding such judgment indebtedness, issue, upon the resolution of the board of directors of the district, the negotiable bonds of such district running not more than ten years, and bearing a rate of interest not exceeding ten per cent per annum, payable semi-annually, which bonds shall be signed by the president of the district and countersigned by the secretary, and shall not be disposed of for less than their par value, nor for any other purpose than that provided for by this act; and such bonds shall be binding and obligatory upon the district.

**"SEC. 2.** It shall be the duty of the board of directors of any district which shall issue bonds under this act to provide for the payment of the same by the levy of tax therefor, in addition to the other taxes provided by law, and they are hereby required to levy such amount each year as shall be sufficient to meet the interest on such bonds promptly as it accrues.

**"SEC. 3.** The bonds issued under this act shall be in the name of the district, and substantially the same form as by law provided for county bonds; shall be payable at the pleasure of the district; shall be registered in the office of the county auditor; shall be numbered consecutively, and redeemed in the order of their issuance. Approved March 25, 1878."

The bond is indorsed in blank by the payee. The other bonds, nine in number, are in all respects like the one set out, excepting that three of them are for **§ 34** but one hundred dollars each. The plaintiff claims to have purchased the bonds in good faith, for a valuable consideration, before they were due, and without knowledge or notice of any matter affecting their validity.

The defendant claims that the bonds are fraudulent and void; that they were issued without consideration; that the judgment for the payment of which they purport to have been issued was paid and canceled before they were issued; that

they were issued in violation of section 3 of article 11 of the constitution of Iowa, which provides that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation." The plaintiff, in reply to the claim of the defendant, alleges that the bonds were ordered to be issued by the board of directors of the defendant; that, after the bonds were issued, the defendant levied taxes for their payment, and paid the interest which fell due thereon for three years from their date, and recognized them as its valid obligations; that the plaintiff relied upon the action of the defendant and its officers, referred to in purchasing the bonds, and that the defendant is now estopped to question their validity. The district court found that the judgment on account of which the bonds in suit were issued was paid before they were issued; that they were issued fraudulently, and in violation of the provision of the constitution quoted; and that they are void in the hands of plaintiff.

1. The judgment which the bonds in suit were issued to satisfy was rendered on the twenty-second day of July, 1873, by the district court of Plymouth county, in favor of James H. Wagner, for the sum of two thousand two hundred and sixty-seven dollars and <sup>33</sup> sixty-one cents. A transcript of the judgment was filed in Lyon county on the twenty-second day of July, 1873. The docket containing this transcript shows entries as follows:

"Received the amount of this judgment in full by issuing the judgment bonds of said district.

"JAMES H. WAGNER."

"This judgment was canceled by error, it being assigned to C. A. Greely in September, 1875, and the said Greely now holds the assignment of said judgment.

"JAMES H. WAGNER."

"Assigned to C. A. Greely, September 18, 1875.

"JAMES H. WAGNER."

It is claimed by the appellee that this judgment was satisfied with judgment bonds issued in August, 1873, and that the second and third entries were fraudulent, and made as a pretext for issuing another set of bonds in pretended payment of the judgment. The deposition of the person who was secretary of the defendant in the years 1872 and 1873



was introduced in evidence. He testified that Wagner obtained a judgment against the defendant in the year 1873; that to the best of his recollection the judgment included Wagner's claims against the district in full, and that bonds were issued to him in satisfaction of that judgment; that the bonds were signed by P. Fullmer, as president, and that he signed a part of them; that one of those bonds had recently been in his possession, and had been by him sent to the attorneys for the defendant. It was shown that a judgment for nine hundred dollars was rendered in Plymouth county against the defendant and in favor of O. Gage and S. D. Hanson. To show the payment of that judgment and the one in controversy the defendant was permitted to introduce in evidence eight bonds. They were alike in form, and purported to be judgment bonds of the defendant; were dated August 5, 1873, and signed by <sup>226</sup> P. Fullmer, as president, and G. Haynes as secretary. Of these bonds, four for five hundred dollars each and one for two hundred dollars were issued to James H. Wagner, and one for five hundred dollars and two for two hundred dollars each were issued in favor of O. Gage and S. D. Hanson. Two of those in favor of Wagner bore the following indorsement:

“ August 21, 1873.

“ For value received, I sell, assign, and guaranty the payment of the within bond to ———, and also the judgment upon which it was issued, in Plymouth county, Iowa, district court.

JAMES H. WAGNER.”

The other bonds in favor of Wagner were indorsed in blank. The bonds in favor of Gage and Hanson were indorsed with their names, “ per James H. Wagner.” Across the face of each bond was stamped the following: “ Canceled by judgment of circuit court in Lyon county, Iowa, Feb. 18, 1879, F. A. Keep, Clerk.” A judgment against the defendant of that date for three thousand two hundred and seventy dollars and fifty cents was shown to have been rendered in Lyon county.

The plaintiff objected to the introduction of the bonds, and now insists that they should have been excluded as incompetent. No record of the defendant showing that the bonds so offered in evidence had been authorized or issued was introduced in evidence, but it was shown that diligent search for such a record had been made, and that it could not be found. Evidence, which was competent in the absence of the

record of the board of directors of the defendant, and which tended to show that such bonds were issued, had been submitted. The aggregate amount of the bonds issued to Wagner and to Gage and Hanson corresponded with the respective judgments rendered in favor of each in Plymouth county. Other judgments against the <sup>327</sup> defendant rendered in Lyon county were shown, but evidence was submitted which tended to show that they were satisfied by other means than the bonds now under consideration. Those, considered with other evidence, certainly tend to prove payment in August, 1873, of the judgment in controversy. They purported to have been issued officially by public officers, and had been found to be the valid obligations of the defendant by the judgment of a competent tribunal. One of them had been identified by the person who signed it as secretary as one of the bonds issued in payment of the Wagner judgment rendered in Plymouth county, and the others had been partially described by him. We are of the opinion that the objection made did not question the sufficiency of the preliminary proof as to the character of the bonds, and that they were properly admitted as competent evidence. There is little direct evidence that the judgment in controversy was paid in 1873, and that is not of a conclusive character; but the circumstantial evidence is quite satisfactory, and fully justified the district court in finding that the judgment was paid in the year named, and that the attempt to recover it and the issuing of the bonds in suit were fraudulent.

2. It is claimed, however, that if it be true that the judgment was paid in 1873, that fact would not prevent a recovery by the plaintiff on the bonds in suit, even though they were issued in violation of the constitutional limitation. The argument advanced in support of this claim is substantially as follows: The board of directors of the defendant was vested by law with power to audit and allow claims against it. The board was therefore vested with authority to determine whether the judgment was unsatisfied, and having decided that it was, and having issued the bonds in suit, reciting therein that they were issued for the <sup>328</sup> purpose of paying off judgments and funding judgment indebtedness under the provisions of chapter 132 of Acts of the Seventeenth General Assembly, in conformity with the resolution of the board to pay it, the action of the board is final, and cannot be questioned by the defendant, especially as against

an innocent purchaser of the bonds for value before maturity. The case of *Sioux City etc. Ry. Co. v. County of Osceola*, 45 Iowa, 169, is relied upon by the appellant. In that case no question in regard to the validity of bonds issued to satisfy a judgment which had already been paid was involved, and we need not therefore consider it further. In this case the judgment in question having once been paid, the bonds in suit, if valid, created a new liability on the part of the defendant equal to their amount. They were not judgment bonds within the meaning of the law, for that authorized the defendant to issue judgment bonds on account of "unsatisfied" judgments. This court is committed to the doctrine that the purchaser of negotiable bonds issued by a municipal corporation is charged with notice that the indebtedness of the corporation is in excess of the amount limited by the constitution. In *French v. Burlington*, 42 Iowa, 617, it was said that "he who contracts with a city whereby an indebtedness is created must, at his peril, take notice of the financial standing and condition of the city, and whether the proposed indebtedness is in excess of the constitutional limitation." True, that case does not involve the rights of an innocent purchaser of negotiable bonds, but it is authority for the conclusion that bonds issued on a contract which created a debt in excess of the constitutional limitations would be invalid. In *McPherson v. Foster*, 43 Iowa, 59, 22 Am. Rep. 215, the validity of bonds issued by an independent district for the building of a school-house in excess of the amount permitted by the constitution was considered, and they were held to be void <sup>329</sup> in the hands of purchasers without actual notice of the fact. In *Mosher v. Independent School District*, 44 Iowa, 124, it was said of bonds of municipal corporation, issued in excess of the constitutional limitation: "The bonds and coupons attached are void, without regard to the good faith with which they are purchased and the want of notice of their invalidity by the holders." In *Kane v. Independent District*, 82 Iowa, 5, this court, in approving a decree of the district court, which set aside a judgment rendered on an alleged indebtedness in excess of the constitutional limitation, used language as follows: "A party who becomes the creditor of a municipal corporation must, at his peril, take notice of the fact that its indebtedness is in excess of the constitutional limitation." See, also, *Doon Township v. Cummins*, 142 U. S. 366, for a discussion as to constitutional limitations. The evidence submitted fully

justified the district court in finding that the bonds in suit were issued contrary to the constitutional inhibition.

3. The fact that the defendant caused taxes to be levied, and the interest on the bonds to be paid for a term of years, is immaterial. Having no power to issue the bonds, its acts in levying taxes for their payment and paying interest were illegal, and neither gave validity to the bonds, nor estopped the defendant to assert their invalidity.

4. Numerous errors in regard to the admission of evidence are assigned. Some of them are disposed of by what we have already said; others are not discussed. In some instances no exception was taken to the ruling of the court, and in no case where an exception was duly preserved and is argued do we find any error which could have affected the final result. We are of the opinion that the conclusions of the district court were authorized by the pleadings and evidence. Its judgment is, therefore, affirmed.

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MUNICIPAL BONDS issued without authority are not binding, even in the hands of *bona fide* purchasers: See note to *Gibbs v. School District*, 26 Am. St. Rep. 299; *Portsmouth Savings Bank v. Village of Ashley*, 91 Mich. 670; 30 Am. St. Rep. 511, and note; *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; *Supervisors v. Cook*, 38 Ill. 44; 87 Am. Dec. 282, and note. Municipal bonds issued in excess of the number and amount authorized by law are void: *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442; and those issued in excess of the indebtedness authorized by law are invalid: *Spitzer v. Village of Blanchard*, 82 Mich. 234.

THOSE WHO CONTRACT WITH MUNICIPAL CORPORATIONS are bound to know the extent of the powers of their officers: *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442, and note.

A PURCHASER OF MUNICIPAL WATER WORKS BONDS IS BOUND TO TAKE NOTICE of the law under which they are issued, and of the records of the city issuing them, and, when such records disclose that they were not issued in compliance with law, the purchaser takes them at his peril, and they are not binding against the city: *Portsmouth Savings Bank v. Village of Ashley*, 91 Mich. 670; 30 Am. St. Rep. 511, and note.

A MUNICIPAL CORPORATION IS NOT ESTOPPED from denying the validity of a contract made by its officers where there was no authority for making the contract: *Young v. Board of Education*, 54 Minn. 385; 40 Am. St. Rep. 340, and note; monographic note to *De Voss v. City of Richmond*, 98 Am. Dec. 664-691, on municipal bonds and defenses thereto. There can be no estoppel or ratification which will preclude a municipality or its officers from denying the validity of a municipal bond issued without authority: *Sutro v. Pettit*, 74 Cal. 332; 5 Am. St. Rep. 442. But a city is estopped from denying the validity of its bond arising from mere irregularities in its execution: *Bogart v. Lamotte Township*, 79 Mich. 294.

## PHELPS v. JAMES.

[36 IOWA, 338.]

**EVIDENCE—DECLARATIONS OF AGENT AS TO PAST TRANSACTION.**—A letter written by a husband without the knowledge or consent of his wife, containing a mere narrative of a completed exchange of his wife's land made by him as her agent, is inadmissible against her in an action to recover for false representations made as to the character of the land.

**EVIDENCE—DECLARATIONS OF AGENT.**—Statements, representations, or admissions of an agent, to be admissible in evidence, must have been made by him at the time of the transaction, either while he was actually engaged in its performance or so soon thereafter as to be a part of it. If made before performance was undertaken or after it was completed, or while the agent was not engaged in the performance of the transaction, or after his authority had expired, they amount to no more than a mere narrative of a past transaction, and are not admissible to bind the principal.

**EVIDENCE—DECLARATIONS OF AGENT—EXPLANATION.**—An agent whose letter containing a narration of a past transaction is admitted in evidence against his principal may explain its contents by showing the circumstances under which it was written, and what was meant by it.

**ACTION** to recover damages for false and fraudulent representations as to the character of certain land acquired by exchange, and the failure of a guaranty made to induce the exchange. The parties to the action, through their respective agents, entered into a written contract to exchange certain hotel property for two hundred and twenty acres of land in Lee county, Iowa. Such agreement provided that each should furnish a good title, without saying anything as to the character, condition, or quality of the land; but providing that "the above is an exchange of said property without regard to valuation." Judgment for plaintiffs. Defendants appeal.

*Bosquet and Earle, for the appellants.*

*A. A. McGarry and Read and Read, for the appellees.*

339 GRANGER, J. 1. This cause was once before in this court, and the case is reported in 79 Iowa, 262. The land in Lee county was formerly owned by one Thomas Flood, and the following, designated as the "Flood guaranty," is important in connection with a question as to the admissibility of evidence:

"I guaranty and represent that my two hundred (200) acre farm in Lee county, Iowa, Van Buren township, 400 is all under fence, composed of wire and rails, in good condi-

tion; that there are one hundred (100) acres or over under plow, balance, good timber, blue grass, and that all of said farm is susceptible of cultivation; and that part of this farm is good second bottom, balance rolling, but not rough, all of which has good, productive soil. The buildings and improvements are as follows: One farm dwelling, one and a half (1½) stories, six rooms in good repair; good granary, smokehouse, stable for four (4) horses, and haymow; also one other small house and one two-story frame feed-mill, almost new; size of building, 20 x 30 feet; good pair of French stone burrs; corn-sheller, new, and all necessary machinery to run it; good boiler and engine, all in good repair; running water for stock all the year around, spring and creek. The farm is located on the main county road, within one and a half (1½) miles of the K. & D. M. R. R. station, and one and a half (1½) miles from Des Moines river. And I also guaranty said farm not to overflow from the Des Moines river.

[SIGNED] "THOMAS FLOOD."

This paper was put in evidence by the plaintiffs under a claim that it was "turned in" with other papers at the time of making the contract of exchange as a part of the representations and guaranties as to the character of the land, and it is set out in the petition as being the guaranty made, and is denied by the answer, it being the contention of the defendants that they refused to indorse or sanction the instrument as a part of the transaction. O. M. James is the wife of her codefendant, J. T. James, and the title to the Lee county land was in her. The court instructed the jury that J. T. James was the agent for his wife, and that she was "bound by his acts, knowledge, and conduct in respect to any such transactions," referring to the sale of the land in question, and we think the record justifies <sup>401</sup> the instruction.

One Enos Reed was a tenant on the land in question, having a leasehold interest therein terminating March 1, 1888. On the twenty-third day of May, 1887, the following letter was written:

"DES MOINES, IOWA, May 23, 1887.

"*Enos Reed, Esq.,*

"DEAR SIR: I placed the farm in the hands of real estate men here to trade off for me, and they have just closed a trade with a Mr. Phelps, and I have assigned over to him the lease and your note. I have never seen Mr. Phelps

myself, but presume he will come down there soon to look over his farm. He bought it on Mr. Flood's written representation, and I hope Mr. Phelps will be pleased with it, and find the farm in every respect fully as good as Mr. Flood represented it to be.

Yours truly,

"O. M. JAMES.

"P. S. My brother sends his regards to yourself and wife, and says he don't want you to ever tell anybody he was down there, and for you not to forget about his and your private understanding about the lease. He says you will know what he means by this.

O. M. J."

This letter was, in fact, written by J. T. James, without the knowledge of his wife. It will be observed that her name appears to the letter. The letter was admitted in evidence. Objections were interposed by the defendants jointly, and by O. M. James specially, "because the same is merely a narrative of a past transaction, and in no way binding upon her." Against the objections the letter was admitted, and this action of the court is assigned as error. It will be observed that the letter was written two days after the transaction was completed, and is in no way connected with its consummation. It is, of course, no more binding on O. M. James than it would have been <sup>402</sup> if signed by J. T. James, for it was only the act of an agent. This question seems so vital in the case that it is deserving of somewhat careful consideration.

The ruling of the court can only be sustained on the theory that the statements and declarations of the letter are such as, when made by an agent, will bind his principal. The rule governing the admission of such evidence is quite concisely stated by Mr. Justice Reed in *McPherrin v. Jennings*, 66 Iowa, 622, as follows: "The ground upon which the declarations or admissions of an agent are admitted in evidence against his principal is, that whatever he does or says in reference to the business in which he is at the time employed, and which is within the scope of his authority, is done or said by the principal: *United States v. Gooding*, 12 Wheat. 460; *American Fur Co. v. Unites States*, 2 Pet. 358; *Stiles v. Western R. R. Co.*, 8 Met. 44; 41 Am. Dec. 486; *Corbin v. Adams*, 6 Cush. 93; *Morse v. Connecticut River R. R. Co.*, 6 Gray, 450; 1 Greenleaf on Evidence, sec. 113. Under this rule the plaintiff was entitled to introduce evidence of the declarations in question only in case he had established that the person who



made them was in fact the agent of the defendant, that they related to a matter within the scope of his employment as such agent, and that at the time of making them he was engaged in the performance of some duty with reference to the matter to which they related." It will readily be observed that a very essential fact is wanting, under the rule stated, to render the declarations of J. T. James in the letter competent, viz., that "he was engaged" at the time of making them "in the performance of some duty with reference to the matter to which they related." Mr. Chief Justice Dillon also clearly states the rule in *Sweatland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285.

The general rule in argument is not controverted, ~~403~~ but it is urged that "the declarations of an agent are admissible if they spring from the transaction and controversy, and to qualify, characterize, and explain it, and are voluntary and spontaneous, and are made at the time, or so near as to preclude the idea of a deliberate design on the part of the agent." The appellees, in support of this, cite *Mechem on Agency*, section 715. The preceding section contains some quite significant language in view of the particular facts of this case. It is there said: "And the statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction; or, to use the common expression, they must have been a part of the *res gestæ*. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible. In such a case they amount to no more than a mere narrative of a past transaction, and do not bind the principal. The reason is that while the agent was authorized to act or speak at the time, and within the scope of his authority, he is not authorized at a subsequent time to *narrate what he had done or how he had done it.*" We have italicized the concluding words of the quotation to indicate their close relation to the contents of the letter, which was a mere narrative of what had been done and how it was done. The section cited (715) states that the authorities are conflicting as to what constitutes a part of the *res gestæ*, and that the question is one of difficulty; that the doctrine of the later cases is that each transaction is to be judged by its own peculiar facts

without conclusive regard to a fixed interval of time, and with more regard to the question whether the declarations or <sup>404</sup> admissions seem to have been voluntary, and spontaneously made, under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. The author cites numerous cases where declarations have been excluded, and others where they have been admitted, illustrating the rule he has stated, and while there is not exact harmony of thought in the reasoning of the cases, or as to the governing rule, there is no case with facts so similar as to sustain the rule claimed by the appellee in this case, while nearly, if not all, the cases sustain the opposite rule.

There is, however, a claim that this letter is admissible for other purposes, and we think the claim has support in the record. But the manifest purpose of its introduction and use was to make the declaration therein, as to the Flood guaranty, binding upon Mrs. O. M. James as her admission. The jury could have received it in no other light. The letter was certainly in respect to the sale of the land, and the court said to the jury that J. T. James was her agent, and that she was "bound by his acts, knowledge, and conduct in respect to any such transaction." The letter contained the admission that the land was sold upon Mr. Flood's guaranty, and the effect was to bind her by the admission. An instruction was given relative to letters written by the defendants to Enos Reed, and how they were to be considered in some respects, but there is nothing bearing upon the question of the right of J. T. James, as agent, to bind her by his declarations after the transaction was completed. The admission of the letter, without some instruction saving the rights of O. M. James, was error.

2. After the letter was in evidence the defendant sought to explain why the statement in the letter in regard to the Flood guaranty was made, and the explanation was substantially as <sup>405</sup> follows: A. M. Johnson was the agent for the defendants in making the contract of sale. The defendants desired to show by J. T. James that, after the transaction and before he wrote the letter, he had a conversation with Mr. Johnson, in which Johnson told him that the plaintiffs wanted the "Flood guaranty" indorsed over to them, but that he refused to do so, and refused to make any representations as to the land, and told them in substance that they must "take the

farm as they found it." Johnson also told James that Phelps had the written recommendation known as the "Flood guaranty." They also desired to show by J. T. James that he meant by the expression in the letter "he bought it on Mr. Flood's representation," that he took it relying on Mr. Flood's representation and not on theirs, the defendants'. A careful reading of the letter will show that it could bear such a construction. It was surely error to refuse the explanation. The exclusion of the explanation intensified the purpose of the letter, as showing the admissions of Mrs. James, for the defendants were not permitted to give it any other effect. With the Flood guaranty and the letter in evidence, with the explanation excluded, the court could well have said to the jury that the land was sold under the terms of the Flood guaranty, for there could not well have been any other conclusion. There is no conflict of authority as to the right to make such an explanation. Even if the letter had been written by O. M. James she should have been permitted to show the circumstances under which she made the statement, and what she meant by it. It will be borne in mind that this letter was not acted upon by the plaintiffs in making the contract. It was merely a question of admission after the contract was made. In *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174, 14 Am. Rep. 494, this language is used: "If the language of a witness, either written or oral, is introduced to establish an admission, he has the privilege of giving his understanding <sup>406</sup> of its import—of stating its true meaning in the connection as used by him." The case refers to 1 Greenleaf on Evidence, section 462, note 1.

We discover no other assignment of error which we think it necessary to consider, in view of a new trial, and the judgment is reversed.

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IN the case of *Yordy v. Marshall County*, 86 Iowa, 340, an action against a county to recover damages sustained from an accident caused by the breaking down of a bridge, it was decided that evidence of declarations made by a member of the board of county supervisors after the accident, confessing knowledge that the bridge was unsafe, but not made while he was engaged in any official work or employment for the county, was not admissible because it was a mere narration of a past event, in no way connected with, nor a part of, the *res gestæ*, citing *Sweatland v. Illinois etc. Tel. Co.*, 27 Iowa, 433; 1 Am. Rep. 285; *Treadway v. Cedar Falls etc. R. R. Co.*, 40 Iowa, 526; *Verry v. Burlington etc. R. R. Co.*, 47 Iowa, 549; *McPherrin v. Jennings*, 66 Iowa, 622; *Luby v. Hudson River R. R. Co.*, 17 N. Y. 131.

**AGENCY—PRINCIPAL WHEN NOT BOUND BY DECLARATIONS OF AGENT.**—An agent, after a transaction has been completed, cannot bind his principal by any admission or declaration he may make concerning its character: *Borland v. Nevada Bank*, 99 Cal. 89; 37 Am. St. Rep. 32, and note, with the cases collected.

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## EVANS v. HUNTER.

[86 IOWA, 412.]

**LEGACIES—WHEN GENERAL AND WHEN SPECIFIC.**—A bequest of a specified amount in public funds, or stock, or money is general, but further describing the property as being then owned by the testator, or particularly describing property embodied in the bequest and owned by the testator at the time of his death, is special and specific.

**LEGACIES—WHEN GENERAL.**—A bequest of four thousand dollars in United States government bonds, without any designation of the source from which they are to be obtained, is general, and may be satisfied by delivering to the legatee any bonds of the kind named in the amount specified, although the testator is possessed of the required amount of such bonds at the time of his death.

**LEGACIES WHEN SPECIFIC ARE NOT SUBJECT TO CONTRIBUTE** to any deficiency occurring in other bequests, nor can a specific legatee claim to have any deficiency which may be found to exist in his legacy made up from other portions of the estate.

*D. A. Wynkoop*, for the appellant.

*Keck and House*, for the appellee.

412 **ROBINSON, C. J.** On the fifteenth day of April, 1885, George Roberts executed a will. On the twentieth day of November he died, and the will was duly proven in the proper court. The plaintiff is the executor named in the will, and seeks to have interpreted two of its paragraphs, which are as follows: "1. I give and bequeath my daughter, Senna Hunter, four thousand dollars in United States government bonds, to be delivered to her, if alive, at my death; if not, to her children; and, if she has none, to be equally divided between my children, or theirs, if they are deceased at my death; 2. To Mary Dawes, my eldest daughter, I give and bequeath one thousand dollars in United States government bonds, and five hundred 414 dollars in cash, and, if paid before my decease, it is to be in full satisfaction of this bequest of five hundred dollars."

The plaintiff contends that the legacies to Mrs. Hunter and Mrs. Dawes are general, and he avers that he has offered, and is now ready to pay, the former four thousand dollars,

and the latter fifteen hundred dollars, in full of the amounts to which they are entitled under the will. The testator, at death, left United States bonds to the amount of five thousand dollars, and the appellant contends that the legacies of bonds are specific, and that the legatees are entitled to the respective amounts of bonds due them under the will from those left by the testator. The district court found that the legacies were general, and authorized the plaintiff to deliver to each legatee the amount of bonds to which she was entitled under the will, in any bonds of the United States.

It will be noticed that the bequest to the appellant was of "four thousand dollars in United States government bonds," without any designation of the source from which they were to be obtained. It is insisted that, as decedent had the amount of bonds required by the will for distribution at the time of his death, it is fair to presume that they were the ones contemplated by the will. It is not shown that he owned any bonds at the time of making the will, but it is possible that he then had them, or that he afterwards obtained them for the purposes of the will. That may be conjectured, but is not shown. Certainly, it is not expressed in the will, and it is the general rule that the intent of the testator must be gathered from the will without the aid of extrinsic evidence: Schouler on Wills, sec. 567, et seq. It was said by this court in *Alden v. Johnson*, 63 Iowa, 127, that "we can look only to the will itself, guided by the rules of interpretation, in order to determine the intention of the testator, and cannot, for that <sup>415</sup> purpose, resort to other sources to discover it." "A general legacy is one which does not necessitate delivering any particular thing, or paying money out of any particular portion of the estate. But a specific legacy is the converse of this": Schouler on Executors, sec. 461. See, also, Redfield on Wills, pt. 2, p. 457.

The question to be determined is whether the requirements of the will can be satisfied only by delivering to the legatees the bonds which the testator owned at death. In *Sponsler's Appeal*, 107 Pa. St. 95, the will under consideration contained a provision as follows: "I also give and bequeath to her, the said Alice, fifteen shares of second preferred Cumberland Valley Railroad stock, and one second mortgage five hundred dollar bond (No. 1) of said railroad company." A codicil contained the following: "I further give to my cousin, Alice Pheem, in addition to what I have given her by my will

fifteen shares of Cumberland Valley Railroad stock, preferred; one Cumberland Valley Railroad eight per cent bond, and thirty shares of Carlisle Deposit Bank stock." It was held that the legacy of the railroad stock was general, and that the fact that the testator had only fifteen shares of the stock described when he made the will and when he died did not operate to make it special.

The facts considered in *Tift v. Porter*, 8 N. Y. 516, were substantially as follows: The testator bequeathed to his wife two hundred and forty shares, and to Harriet S. Glover one hundred and twenty shares of stock of the Cayuga County Bank. He owned three hundred and sixty shares of that stock when he died. The court defined "legacies" as follows: "A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. It is specific when it is a bequest of a specified part of the testator's personal estate which is so distinguished," 416 and, following the definition, held that the legacies of stock were general. A bequest of a specified amount in public funds or stock or money is general, but, if the property is further described as being then owned by the testator, the bequest is special: Schouler on Executors, sec. 461. A specific legacy is not subject to contribute to any deficiency which may occur in other bequests, nor can a specific legatee claim to have any deficiency which may be found to exist in his legacy made up from other portions of the estate: Redfield on Wills, pt. 2, p. 462; Schouler on Executors, sec. 461; 2 Williams on Executors, 1251.

When the recognized rules of interpretation are applied to the will under consideration its legal effect is not doubtful. There is no ambiguity in the language used. Its requirements as to bonds will be satisfied by the delivery to the legatees of any bonds of the United States in the amounts specified. Had the will identified the particular bonds which were owned by the testator at the time of his death, or had it described them as belonging to him when the will was executed, and he had then owned them, the legacies would have been specific: See *Smith v. McKitterick*, 51 Iowa, 548. But the language used cannot be given that effect. If the testator had never owned bonds, or, having them to the amount of five thousand dollars, he had disposed of them during his lifetime, the legacies would not have been defeated, but it would

have been the duty of the executor to procure United States bonds with which to pay them. We conclude that the legacies are general.

The decree of the district court is therefore affirmed.

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**LEGACIES—WHEN GENERAL AND WHEN SPECIFIC, AND THE ABATEMENT OF.**—These questions are discussed in the monographic notes to *Brill v. Wright*, 8 Am. St. Rep. 720-726, and *Walton v. Walton*, 11 Am. Dec. 468-471. See, also, the later case of *McFadden v. Hefley*, 28 S. C. 317; 13 Am. St. Rep. 675, and note, where specific legacies are defined and instances of the same given.

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## MILNER v. NELSON.

[86 IOWA, 452.]

**ACKNOWLEDGMENT OF MORTGAGE—SUFFICIENCY.**—A notary's certificate of acknowledgment attached to a mortgage in due form of law, except that the name of the mortgagor is left blank, is not fatally defective if such name can be supplied and ascertained by reference to the body of the mortgage. The record of such instrument is sufficient to impart constructive notice to a subsequent purchaser in good faith without actual knowledge of the mortgage.

*Willard and Willard*, for the appellant.

*Andrews and Hanna*, for the appellee.

<sup>456</sup> ROTHROCK, J. The defendant had no actual knowledge of the mortgage when he purchased the property. The sole question is whether the mortgage was in its form sufficient to impart constructive notice to the defendant. The defect which the defendant claims is fatal to the mortgage is to be found in the acknowledgment, which is in these words:

"STATE OF IOWA, }  
 "Cass County, } ss.

"Be it remembered, that on the twelfth day of October, 1887, before the undersigned, James G. Whitney, <sup>457</sup> notary public in and for said county, personally came —, to me known to be the identical person whose name is affixed to the foregoing instrument as grantor, and acknowledged the execution of the same to be his voluntary act and deed. Witness my hand and seal the day and year last above written.

[SEAL] "JAMES G. WHITNEY, Notary Public."

This certificate of acknowledgment is in due form of law, with the exception that the name of the grantor is left blank. It was held by the district court that by reason of said omis-



sion the acknowledgment was fatally defective, and did not impart constructive notice to the defendant. The mortgage was signed by A. B. Case, the grantor, and it was filed for record on the day after it was executed, and was duly recorded before the defendant purchased the property. It does not appear that there was any defect in the record of indexes in the recorder's office. The statute of this state prescribing the requisites necessary to an acknowledgment of a deed or mortgage is found in section 1958 of the code, and is as follows:

"The court or officer taking the acknowledgment must indorse upon the deed or other instrument a certificate setting forth the following particulars: 1. The title of the court or person before whom the acknowledgment is taken; 2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness, naming him; 3. That such person acknowledged the instrument to be his voluntary act and deed."

There have been a number of cases in this court in which acknowledgments have been questioned and held to be valid or invalid. It was held in *Bell v. Evans*, 10 Iowa, 353, that the certificate is not required <sup>458</sup> to be in the exact words of the statute, and that reference may be had to the body of the deed or mortgage in aid of the certificate of acknowledgment. In *Cavender v. Smith*, 5 Iowa, 159, it was held that such a certificate is good, though not in the language of the statute, provided the words used substantially comply with the object and meaning of the law: See, also, *Tiffany v. Glorer*, 3 G. Greene, 387, and *Wickersham v. Reeves*, 1 Iowa, 413. In *Scharfenburg v. Bishop*, 35 Iowa, 60, attention is called to the fact that the statute does not in terms require that the certificate of acknowledgment shall set forth that the person making the acknowledgment did personally appear before the officer. It may also be said that the statute does not expressly require that the name of the person making the acknowledgment be inserted in the certificate. It does require that, if a witness be called to prove the identity of the grantor, he shall be named in the certificate. We cite these cases for the purpose of showing that there is no requirement that the statute shall be followed literally, and that a sub-

stantial compliance is sufficient. Of course, where, as in the cases cited, and in other cases, some substantial fact is omitted, such as that the instrument was voluntarily executed, the defect would be fatal. In such case the searcher of the record of liens would find that there was no evidence of a voluntary act, and reference to the body of the instrument would not aid the certificate of acknowledgment.

A very full and exhaustive article upon the subject of acknowledgments may be found in 1 American and English Encyclopedia of Law, page 143. It is there stated that a "certificate must be construed with reference to the instrument it is attached to, and the instrument is allowed to help out the construction of the certificate, and, if the certificate is inconsistent with the instrument, and ambiguous, the court will look to the instrument; <sup>459</sup> or any part of it, together with the certificate, in order to arrive at the true meaning of the officer."

In a note to the statement above quoted authorities are cited from some fourteen states, and from the supreme court of the United States. It is not necessary to more than refer to these cases. They are in harmony with the decisions of this court. Again, it is said in the article above cited that "the name of the grantor should appear, although it is now generally held that, if the name can be ascertained from the deed, the certificate will be sustained." A large number of authorities are cited in support of this last proposition. Among the cases cited is the following: *Kelly v. Rosenstock*, 45 Md. 389, where a statute required that a certificate of acknowledgment shall state "the time when it was taken"; it was held that the whole instrument might be examined, and that the date of acknowledgment might be determined by such an examination. In *Chandler v. Spear*, 22 Vt. 388, it was held that, "although the name of the grantor in a deed is defectively stated in the certificate of the acknowledgment, yet, if it appear from the whole instrument with reasonable certainty that it was acknowledged by the grantor, it is sufficient." In *Sanford v. Bulkley*, 30 Conn. 344, the certificate to the acknowledgment was in these words: "Personally appeared —, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed." It was held that the acknowledgment was good. In *Wilcoxon v. Osborn*, 77 Mo. 622, the certificate was substantially the same as in the case at bar, and it was held that it

was sufficient when construed with reference to the deed to which it was attached. And in *Bradford v. Dawson*, 2 Ala. 203, it was held that, "when the certificate does not pursue the form required by statute the deed may be looked into to support the defective certificate": See, also, Martindale on Conveyances, sec. 259.

<sup>460</sup> It is true that there is not entire harmony in the adjudged cases upon the question. In *Gove v. Cather*, 28 Ill. 634, 76 Am. Dec. 711, the right of a wife to dower was involved. The certificate of acknowledgment did not state that the wife was known to the officer to be the person who signed the deed, and it was defective in other respects. It was held that the certificate was bad. The statute of that state required that the certificate should state that fact, and that the statutory form must be substantially complied with. That was an omission of matter of substance. The case of *Tully v. Davis*, 30 Ill. 103, 83 Am. Dec. 179, is to the same effect. The effect in that case was that the officer did not certify that the person making the acknowledgment was known to the officer to be the person who executed the deed. In *Smith v. Hunt*, 18 Ohio, 260, 42 Am. Dec. 201, the name of the grantor was blank in the certificate of acknowledgment. It was held that the acknowledgment was fatally defective. But in that case the officer did not certify that he knew the person who did appear before him was the person who signed the instrument as grantor. The certificate is a mere recital that the person acknowledged that he did sign and seal the instrument. There was no identity of the person shown, as in the case at bar. In the case of *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128, it is held that where the husband and wife executed a deed, and appeared before an officer and acknowledged it, the certificate of acknowledgment was defective because in that part which required a privy examination of the wife separate and apart from the husband the names were left blank. The decision was under a statute which required the officer to examine the wife separately and apart and out of hearing of the husband, and to make known the contents of the instrument to her. We have no such requirement in this state. A privy examination of the wife in such cases arose out of the idea that a wife is subject to the <sup>461</sup> will of the husband, and an examination of the present laws of conveyances will show that the modern method of conveyancing is based upon the idea that a married woman is not pre-

sumably under any such restraint. In all these cases the thought is nowhere expressed that in determining whether a certificate of acknowledgment is sufficient, not only the certificate, but the whole instrument, must be examined and considered; or, as is said in *Carpenter v. Dexter*, 8 Wall. 513: "In aid of the certificate, reference may be had to the instrument itself, or any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections."

It is unnecessary to prolong this discussion further. The certificate shows unmistakably that some person appeared before the notary public; that the person who thus appeared was known to the officer to be the identical person whose name was affixed to the instrument as grantor; and that the person whose name was so affixed acknowledged the same to be his voluntary act and deed. Direct reference is made to the signature to the mortgage as an identification of the person who appeared before the officer. A glance at the signature to the mortgage fully identifies A. B. Case as the person who appeared before the notary. It appears to us that the reasoning by which it is sought to make it appear that the blank in the acknowledgment imports that no person appeared before the officer is too refined to be applied to the business transactions of men. The whole scope and meaning of the certificate shows that the grantor in the mortgage appeared before the officer. In our opinion, to hold otherwise would defeat rights by a mere technicality. If a person were to go to the record of mortgages of Audubon county he would find from the index that on the twelfth day of October, 1887, A. B. Case executed a mortgage on <sup>462</sup> certain personal property to S. B. Milner, and, upon referring to the mortgage as spread upon the records, he would find that A. B. Case signed the mortgage, and immediately following that he would find this certificate of acknowledgment. In our judgment he would there find every substantial requirement of the statute.

The judgment of the district court is reversed.

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ROBINSON, C. J., dissented on the ground that a notary's certificate of acknowledgment is not sufficient unless it contains the name of the person who acknowledged the instrument to which it is attached, and that the omission of such name is such a manifest and material defect as cannot be supplied by construction or by reference to the acknowledged instrument.

Hence the record thereof imparts no constructive notice to a subsequent *bona fide* purchaser without actual notice. In support of this contention the learned judge cited *Gove v. Cather*, 23 Ill. 641; 76 Am. Dec. 711; *Tully v. Davis*, 30 Ill. 103; 83 Am. Dec. 179; *Huff v. Webb*, 64 Tex. 286; *Buell v. Irwin*, 24 Mich. 152; *Smith v. Hunt*, 13 Ohio, 260; 42 Am. Dec. 201; *Hayden v. Westcott*, 11 Conn. 131, and *Merritt v. Yates*, 71 Ill. 636; 22 Am. Rep. 128.

**ACKNOWLEDGMENT.—EFFECT OF OMISSION OR ERROR AS TO NAME OF PARTY MAKING:** See the extended note to *Livingston v. Kittelle*, 41 Am. Dec. 176, and the note to *Tully v. Davis*, 83 Am. Dec. 180. An acknowledgment of a mortgage having in blank the name of the person acknowledging it vests no legal interest in the mortgage: *Smith v. Hunt*, 13 Ohio, 260; 42 Am. Dec. 201, and note; and see, also, *Merritt v. Yates*, 71 Ill. 636; 22 Am. Rep. 128.

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## MIGHELL v. DOUGHERTY.

[86 IOWA, 480.]

**JURY TRIAL—ERROR CURED BY INSTRUCTION.**—An instruction to the jury not to consider a particular count in the complaint cures error in admitting evidence thereunder.

**STATUTE OF FRAUDS—SALE OF GROWING CROP.**—An oral agreement for the sale of growing grain, to be delivered in marketable condition, under which no part of the purchase price is paid nor any of the crop delivered, while money and labor must be expended to make the crop marketable, is not taken out of the operation of the statute of frauds by virtue of an exception therein that it shall not apply "when the article of personal property sold is not, at the time of the contract, owned by the vendor, and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same."

**STATUTE OF FRAUDS—ORAL SALE OF PERSONALTY.**—In order to take a contract for the sale of personal property out of the operation of the statute of frauds, on the ground that labor, skill, and money are necessary to be expended in producing or procuring it, it must appear that the contract is essentially one calling for special skill, labor, or workmanship.

**STATUTE OF FRAUD—ORAL SALE OF GROWING CROP.**—A sale of growing grain, to be delivered in marketable condition—harvested and threshed—when no part is delivered, and none of the purchase money paid, is within the statute of frauds, though one of its provisions exempts therefrom sales of personalty "when the article sold is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same."

*M. R. McCrary and J. B. McCrary*, for the appellant.

*J. C. Kerr*, for the appellee.

482 KINNE, J. The plaintiff claims that on July 20, 1890, he orally contracted with the defendant to deliver to him (the plaintiff), at his elevator in Lake City, Iowa, one thou-

said five hundred bushels of oats of the crop of 1890, then raised and unthreshed, at the agreed price of eighteen cents per bushel; that the defendant has refused to perform his contract; that he has sustained damages in the sum of three hundred and fifty dollars. To this petition a demurrer was sustained, on the ground that the alleged contract was within the statute of frauds. Afterwards the petition was amended by alleging that the grain thus contracted to be sold in 1890 was raised that year by the defendant, and was on July 20, 1890, unthreshed; that said oats were to be delivered in a merchantable condition; <sup>483</sup> and that, in order to thresh and put them in merchantable condition, it was necessary to expend work and labor, skill and money, on said oats; that the plaintiff relies on the evidence of the defendant to establish said contract. In a second count it is averred that on July 20, 1890, the defendant contracted with the plaintiff to deliver to him, at his elevator in Lake City, one thousand five hundred bushels of oats, then growing or grown in Calhoun county, Iowa, and then the property of the defendant, at the agreed price of eighteen cents per bushel; that they were to be delivered to the plaintiff in merchantable condition, and that money had to be expended, and work and labor expended thereon, in order to place said oats in such condition, and deliver them to the plaintiff, on or before September 30, 1890; that the defendant had refused and neglected to deliver any part of said oats; that the market price of oats in Lake City at the time agreed upon for delivery was forty cents per bushel. Judgment was asked for three hundred and fifty dollars.

The defendant, in substance, denies the allegations in the first count of the plaintiff's petition, and as to the second count he says the pretended contract is within the statute of frauds, because the contract was not in writing, no part of the purchase price paid, and no part of the grain delivered. That said grain was owned and possessed by the defendant at the time of the pretended contract. The case was tried to a jury, who returned a verdict for the plaintiff for one hundred and ninety-five dollars, on which judgment was entered.

1. Our statute reads that, except when otherwise provided, no evidence of a contract in relation to the sale of personal property, when no part of the property is delivered and no part of the price is paid, is competent, unless it be in writing

and signed by the party charged, or by his lawfully authorized agent: Code, secs. 3663, <sup>484</sup> 3664. It is also provided that the provisions quoted shall not "prevent the party himself against whom the unwritten contract is sought to be enforced from being called as a witness by the opposite party, nor his oral testimony from being evidence": Code, sec. 3667. We have held that, while our statute provides that no evidence of any such contract is competent, and the language of the English statute is, "no action shall be brought," the effect is the same in both cases: *Westheimer v. Peacock*, 2 Iowa, 531. The defendant was put on the stand as a witness for the plaintiff under the statute, and the appellant complains that the court also permitted the plaintiff to introduce other witnesses to establish the contract. It is the settled rule in this state that, where the adverse party is called as a witness under such circumstances, the plaintiff must establish the contract by his testimony alone, and the evidence of other witnesses cannot be received to contradict or explain it, or supply omissions in it: *Auter v. Miller*, 18 Iowa, 411. Nor can he introduce other evidence to contradict or impeach that of the defendant: *Hunt v. Coe*, 15 Iowa, 198; *Thorn v. Moore*, 21 Iowa, 285. Hence, if this was a case within the statute, the admission of testimony, other than that of the defendant, to establish the contract was error. The error, if any, however, was cured by the third instruction of the court, in which the jury are told to give the cause of action set out in the plaintiff's first count no consideration, as the defendant's evidence was not sufficient to establish the contract therein set out: *Kinne's Pleading and Practice*, sec. 535, and cases cited.

2. This case squarely raises the question as to whether a sale of growing grain to be delivered in marketable condition—harvested and threshed—when no part thereof is delivered, and none of the purchase price is paid, can be taken out of the operation of our statute <sup>485</sup> of frauds by virtue of the exception that the provisions of the statute shall not apply "when the article of personal property sold is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same": Code, sec. 3665. It may be conceded that there are authorities holding that a sale of such property, under such circumstances, is not within the statute of frauds, but we think such is not the correct rule



The authorities in our own state throw very little light on this question. It was held in *Partridge v. Wilsey*, 8 Iowa, 459, that, in case of a sale of personal property, the fact that the goods were to be shipped from New York city to Keokuk at an expense did not take it out from the operation of the statute. In *Bennett v. Nye*, 4 G. Greene, 410, the facts stated are so meager as to make it of little force as a precedent. It does not appear in that case whether the hogs sold were owned by the defendant, or even in existence, at the time of making the contract. The word "producing," under the statute, means "giving being or form to," "manufacturing," "making"; and "procuring" means "bringing into possession," "obtaining": Webster's Dictionary. Hence the labor, skill, or money necessarily expended for "producing or procuring" the article must be in giving it being or form, manufacturing or making it, or in bringing the article into possession, as by purchasing it, and the like.

Clearly, it seems to us, it cannot be said, within the scope of these definitions and the meaning of the words as used in the statute, that the defendant, by harvesting, threshing, and hauling to market his oats, is bestowing labor, skill, and money in either "producing or procuring" the oats. He expended no labor, skill, or money by virtue of the contract that he would not have done if the contract had never existed. The <sup>496</sup> grain existed at the time of the making of the contract, in the identical form in which it would finally be sold. True, it must be harvested and separated from the straw and chaff. So the grain was not produced by the defendant at all, nor did he procure it. He had the oats, but, to put them in proper shape for market, he must cut, thresh, and haul them. All this he would have done at his own instance, even if he had never heard of the plaintiff. This labor, skill, and money, then, was not expended specially at the instance of the plaintiff.

The acts relied upon to take this case out from under the provision of the statute, and bring it within the exception heretofore quoted, are acts only which naturally and necessarily were a part of the plaintiff's business and avocation. His care of these oats was not in any way affected by the contract of sale. His situation in that respect may be likened to a manufacturer who contracts to sell to one certain goods, being of the kind and character he manufactures for his trade generally. In such a case, as the manufacturer produces

the goods in the usual course of his business, the contract would be one of sale, not for the bestowal of work and labor: *Pratt v. Miller*, 109 Mo. 78; 32 Am. St. Rep. 656; *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112. A material inquiry in the case at bar is, as we have indicated, as to whether the defendant, in order to comply with his contract, would be compelled to change his condition, business, or manner of doing his regular business. The necessity for harvesting, threshing, and hauling his grain existed regardless of the alleged contract: *O'Neil v. New York etc. Mining Co.*, 8 Nev. 141; *Sloan etc. Lumber Co. v. Guttshall*, 8 Col. 14.

Another proposition may be stated here, that, in order to take a contract for the sale of personal property out of the statute on the ground that labor, skill, and money are necessary to be expended in producing or <sup>487</sup> procuring it, it must appear that the contract was essentially one calling for special skill, labor, or workmanship: *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722. Such, as we have seen, was not the case at bar.

In cases like this we think the true rule is, if the grain is sold and no part of it delivered, and no part of the price is paid, and the contract is not in writing, and the labor, skill, and money which is necessary to be expended upon it to fit it for market is such only as in the ordinary course of the defendant's business he would be compelled to expend upon it or devote to it, in order to preserve and care for it as a good husbandman, the case is purely a sale, and comes within the statute. It may be if the defendant had contracted to plant or raise a crop of such a character or kind as required special skill, labor, or work, other than that required in the ordinary performance of his labors incident to raising and harvesting his crops, and such special skill and labor was contemplated at the time the contract was made, and was to be bestowed at the instance of and for the benefit of the plaintiff, that the case would be within the exception provided in our statute.

A brief review of a few cases which support the rule above laid down may better illustrate its application: *Baker on Sales*, sec. 54. Chief Justice Shaw held that when a contract is for an article then existing or such an article as the vendor "usually has for sale in the course of his business, the statute applied": *Mixer v. Howarth*, 21 Pick. 205; 32 Am. Dec. 256. In the same case Harris, J., expressed the opinion that if the

work and labor required to be done in order to fit the subject matter of the contract for delivery was to be done for the vendor the case would be within the statute. Story, J., said "that where the subject matter of the contract was not to be created by manufacture, but, being already in existence, was merely to <sup>488</sup> be subjected to certain labor for the purpose of rendering it deliverable, or perhaps even of changing its character, the contract would be within the statute of frauds, it being essentially a contract of sale": Story on Sales, Perkins' ed., secs. 260-260 b. In other words, if the labor and service were wholly incidental to a subject matter in case, the statute applied: Story on Sales, Perkins' ed., secs. 260 c.

The rule is thus stated in a late Massachusetts case: "A contract for the sale of articles then existing or such as the vendor, in the ordinary course of business, manufactures or procures for the general market, whether on hand or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute": *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112. In *O'Neil v. New York etc. Mining Co.*, 3 Nev. 141, the court, virtually following the rule laid down in Massachusetts, held that to make the case one for work and labor, the contract should contemplate or require some change in the condition, business, or circumstances of the vendor. In *Downs v. Ross*, 23 Wend. 270, the contract was for the purchase of wheat, only a part of which was threshed, and that which had been threshed was to be further cleaned. It was held that the case was one of sale, not for work and labor. The court said: "If the thing sold exist at the time *in solido*, the mere fact that the seller is to do something to put it in a marketable condition did not take the contract out of the operation of the statute of frauds": *Cooke v. Millard*, 5 Lans. 246; Baker on Sales, secs. 80, 43. In *Gilman v. Hill*, 36 N. H. 311, it was held that a contract for sheep pelts, to be taken from sheep, was a contract of sale. So a contract for the purchase of all the flax straw to be raised from forty-five bushels of <sup>489</sup> flaxseed, and to be "delivered in a dry condition, free from grass, weeds, and all foreign substances," was held a contract of sale, not for work, labor, or skill, in producing the straw: *Brown v. Sanborn*, 21 Minn. 402.

When wheat was sold to be delivered at a certain mill, and

there was a conflict in the evidence as to whether all of it was threshed prior to the time of making the contract, and the court refused to instruct the jury that the wheat existed *in solido* at the time the contract was made, and not having to be raised or manufactured, though unthreshed, it was a contract within the statute of frauds, and the plaintiff could not recover, the case was reversed for the refusal to give the instruction. The court adhered to the doctrine that a contract for the sale of goods which may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery, is within the statute: *Hardell v. McClure*, 2 Pinn. 289, 1 Chand. 271. In a cause decided in 1882 this same court approved the holding in *Hardell v. McClure*, and, in referring to the contract in that case, says: "It was clearly not a contract for special labor in manufacturing any thing, but a contract to sell and deliver a certain quantity of wheat": *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722. See *Clark v. Nichols*, 107 Mass. 547. A contract for the sale of the whole of a crop of cotton for a certain year, to be delivered at a certain price per pound, as soon as it could be gathered and prepared for market, was held within the statute: *Cason v. Cheely*, 6 Ga. 554. The rule we have announced as applicable to the case at bar also finds support in the following cases: *Spencer v. Cone*, 1 Met. 283; *Lamb v. Crafts*, 12 Met. 353; *Gardner v. Joy*, 9 Met. 177; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55; *Atwater v. Hough*, 29 Conn. 508; 79 Am. Dec. 229; <sup>490</sup> *Finney v. Apgar*, 31 N. J. L. 266; *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 879; 54 Me. 105; *Sawyer v. Ware*, 36 Ala. 675; *Bird v. Muhlinbrink*, 1 Rich. 199; 44 Am. Dec. 247.

The evidence in this case shows without conflict that the defendant expended no work, labor, skill, or money on the oats other than he would have done if there had been no contract of sale. The case, then, is one clearly within our statute. The contract not being in writing, no part of the price having been paid, none of the oats having been delivered, no evidence of the contract was properly receivable. For a review of the cases in England and in this country reference is had to Benjamin on Sales, Bennett's edition, 1892, sections 90-110, and American note following.

Several other errors are assigned. They need not be considered, inasmuch as in no event can the plaintiff recover

under the contract pleaded. The motion to dismiss appeal and affirm the judgment below is overruled. For the reasons given the cause is reversed.

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**STATUTE OF FRAUDS—SALE OF GROWING CROPS, WHETHER WITHIN.**—Contracts for a sale of growing periodical crops are not contracts for the sale of an interest in land within the meaning of the statute of frauds, and need not be in writing to give them validity: *Davis v. McFarlane*, 37 Cal. 634; 99 Am. Dec. 340. Growing wheat is an interest in land, and a contract concerning it is within the statute of frauds: *McIlvaine v. Harris*, 20 Mo. 457; 64 Am. Dec. 196, and note. Growing grasses are a part of the land as a general rule, whether wild or cultivated, and an agreement in writing is required for their sale and severance from the land: *Smith v. Leighton*, 38 Kan. 544; 5 Am. St. Rep. 778, and note. Growing crops are not "goods and chattels" within the meaning of the section of the statute of frauds which requires immediate delivery: *Bernal v. Hovious*, 17 Cal. 541; 79 Am. Dec. 147, and note.

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## STATE v. CLIFFORD.

[86 IOWA, 550.]

**EVIDENCE—CONFESSIONS UNDER OATH.**—Testimony or a confession given before a grand jury, under oath and involuntarily, by one at the time under arrest and charged with the crime then inquired about, without informing him of his rights or of the effect of his testimony, or the possibility of its use against him, is inadmissible on his subsequent trial for such crime.

**EVIDENCE—CONFESSIONS UNDER OATH.**—A statute providing that a member of the grand jury may be compelled to disclose the testimony of a witness examined before such jury to ascertain if it is consistent with that given by him at the trial, does not make testimony given before a grand jury under oath, and involuntarily, by one at the time under arrest and charged with the crime then inquired about, competent on his trial for such crime.

**EVIDENCE—VERDICT ON CIRCUMSTANTIAL EVIDENCE.**—To justify a conviction of crime on circumstantial evidence alone it must be inconsistent with any reasonable theory of innocence. A verdict based on evidence which only raises a suspicion, but does not point with reasonable certainty to guilt, must be set aside.

*Byers and Lockwood*, for the appellant.

*John Y. Stone*, attorney general, and *T. A. Cheshire*, for the state.

551 KINNE, J. 1. The defendant and one Fillmore were indicted for stealing from the barn of Axline and Smith, in the night-time, twenty-six bushels of clover-seed, of the value of one hundred and twenty-five dollars. The court permitted a witness named Cuppy to testify in rebuttal on part of the

state as to statements made by the defendant in his examination before the grand jury. It appears that while the defendant was under arrest and in the county jail, charged with the commission of the very crime for which he was afterwards indicted and tried, the foreman of the grand jury, then in session, had the sheriff of the county bring the defendant before said body, where he was examined under oath as to his supposed connection with the alleged larceny. It does not appear that the defendant was informed as to his rights, or of the effect of the answers he might give, or as to the fact as to whether or not such answers could afterwards be used against him. No minutes of his testimony were taken by the grand jury. We may properly assume that he testified under oath, without being informed as to his rights, or the effect of his testimony, or the possibility of its use against him thereafter. It is contended that his statements so made before the grand jury were not voluntary, and hence inadmissible against him upon the trial. The course of procedure pursued by the grand jury with reference to the examination of this witness was unprecedented, and, to our minds, wholly unjustifiable from any point of view. They had no right to compel the defendant, then in custody, and charged with the commission of the crime inquired about, to give testimony before them. To put him under oath, under such circumstances, without advising him of his rights, was attempting to take an unfair advantage of his situation, to his prejudice. A statement so procured could ~~not~~ in no proper sense be said to be voluntarily made. A confession or statement, to have been voluntarily made, must proceed "from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause." "If made under oath by the party charged, upon a judicial inquiry as to the crime, it [the confession] is rejected, as not being voluntary": *People v. McMahon*, 15 N. Y. 395. The law is well settled that when a person is compelled to answer questions under oath, put to him by a committing magistrate, touching his supposed connection with the crime then being investigated, and of which he stands accused, his statements are not admissible against him: 3 Am. & Eng. Ency. of Law, 488; Wharton's Criminal Evidence, secs. 668, 669; *State v. Matthews*, 66 N. C. 106; *People v. McMahon*, 15 N. Y. 384; *People v. Mondon*, 103 N. Y. 211; 57 Am. Rep. 709. And it is said that, unless the defendant comprehended his rights fully, and is informed by the court or examining

body that his refusal to answer the questions propounded to him could not prejudice his case, or be construed as an evidence of his guilt, any responsive confessions implicating him in the crime charged must be regarded as involuntary, and hence inadmissible: Wharton's Criminal Evidence, secs. 668, 669; *State v. Roris*, 74 N. C. 148; 1 Greenleaf on Evidence, secs. 225, 226, and notes. The same rule would apply as to examinations had, as in this case, before a grand jury. Some of the states, by statute, require magistrates conducting such examinations to admonish the prisoner as to the effect of his answer and his right to refuse to answer, but it is believed that the general rule of law is as above stated, even in the absence of such a statute.

Counsel for the state contend that the evidence was admissible, and cite Code, sec. 4285; *State v. Hayden*, 45 Iowa, 11; *State v. Row*, 81 Iowa, 138, and some <sup>553</sup> Indiana cases. The statute referred to provides that a member of the grand jury may be compelled to disclose the testimony of a witness examined before such jury to ascertain if it be consistent with that given by him before the court. It cannot be said that this statute had the effect of making the testimony given before the grand jury, under oath and involuntarily, by one at the time charged with the very crime then being inquired about, and who, when so examined, was under arrest therefor, competent on a trial of the party under indictment for such crime. Counsel have cited no case so holding, and we find none. We see no reason for holding that the legislature, in enacting the statute referred to, intended to abrogate the universal rule of law that involuntary admissions in confession of a defendant charged with a crime are inadmissible against him on a trial for such crime. The statute was, we think, not intended to cover such a case, and thereby permit a grand juror to give evidence of such involuntary confession which no other person is permitted to testify to. If the defendant, when examined before the grand jury, had been advised as to his rights, and then given evidence, the rule might be different. In *State v. Briggs*, 68 Iowa, 424, it was held that a plea of guilty, entered by a defendant to a preliminary information, he not being informed as to his legal rights, was a voluntary admission of his guilt, and admissible against him. No authorities are cited in support of this holding. In the case at bar the defendant was put under oath. He was taken before the grand jury, not of his



own volition, but by the direction of the examining body, for the purpose of being interrogated as to his supposed connection with the crime with which he was accused. In the Briggs case the magistrate afforded him an opportunity to plead guilty or not guilty. In the case at bar the proceedings as to the defendant's being sworn and examined were of a <sup>554</sup> compulsory character, no election being afforded him. For these and other reasons the holding in *State v. Briggs*, 68 Iowa, 424, does not apply: See, also, *State v. Carroll*, 85 Iowa, 1.

2. It is claimed that the evidence does not warrant a verdict of guilty. In substance, the evidence shows that Axline and Smith, in January, 1892, had thirteen sacks of clover-seed stored in their barn; that about January 20, 1892, said seed was stolen by some one; that it was of the value of one hundred and twenty-five dollars; that one Clouser had worked for Axline and Smith, and, among others, knew where the seed was stored; that he visited Fillmore, who was jointly indicted with the defendant, before the seed was taken; that the sacks which had contained the seed were found, after it had been stolen, at Hancock, Iowa; that about the time the seed was taken Fillmore hauled to Council Bluffs, and sold there, about twenty-six bushels of clover-seed; that Clifford went with him to Council Bluffs, and on the way he ascertained from Fillmore that he had clover-seed in the sacks in the wagon, and saw him hide the sacks under a culvert in the wagon-road, where they were afterwards found. It appears also that the defendant accompanied Fillmore back from Council Bluffs to Avoca. The reasons the defendant gave for going to Council Bluffs with Fillmore were, in part at least, unsatisfactory. But there was no direct evidence in any way connecting the defendant with the crime charged. So far as appears he received no part of the money paid Fillmore for the seed. It does not appear that he was seen at or near the barn where the seed was stored. There is no showing that he in any manner exercised any control over the seed, or the team and wagon by means of which it was conveyed to Council Bluffs. The defendant seems to have been a passenger with Fillmore to Council Bluffs, under suspicious circumstances, which, however, <sup>555</sup> are explainable and consistent with his innocence of the crime charged. The testimony does not point with reasonable certainty even to the defendant's guilt. Stated most strongly against the defendant, it is a

case of suspicion, not of guilt established. We are at a loss to understand on what the jury based a verdict of guilty, unless it was that the defendant, in a few of his answers, evinced a disposition to be what is usually called a "smart" witness. The verdict is without foundation to support it, and cannot stand.

3. It clearly appears from this record that the trial court had grave doubts as to the defendant's guilt. When the court came to impose sentence on the defendant he said to him: "Mr. Clifford, it is contrary to my usual practice to make any comments when passing judgment in cases of this kind, but in this case I am constrained to say to you that you have been found guilty of the crime of larceny upon very slight evidence. I firmly believe that if you had conducted yourself upon the witness-stand as you should have done no jury could have been found that would have returned a verdict of guilty upon such slight and trivial evidence." The conduct which the court speaks of was the manner of the defendant on the stand, especially in his answers to certain questions relating to his reasons for going to Council Bluffs. These answers, which we need not set out here, indicated a want of moral character and rectitude in other directions. We think this was clearly a case where the trial court should have exercised its right to set aside the verdict. If a man is to be committed to the penitentiary for a crime, his guilt of which is established, if at all, by circumstantial evidence, such evidence should not only point him out as guilty, but be inconsistent with any reasonable theory as to his innocence. This the testimony in this case fell far short of doing. It ~~will~~ will not do to let a verdict stand which deprives a man of his liberty when it is based upon mere suspicion.

The judgment of the district court is reversed.

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CONFESSIONS UNDER OATH—WHEN ADMISSIBLE.—A voluntary confession made under oath by a person accused of crime is admissible in evidence against him on his trial for such crime if, before making it, he was duly warned that any statement made by him might be used in evidence against him. If a defendant charged with crime, at his preliminary examination before a magistrate, is informed about his rights with regard to a voluntary confession, and warned that if he does make such confession it may be used in evidence against him, makes a statement confessing his guilt, it is legitimate evidence against him on a subsequent trial for such crime, and is not rendered inadmissible by the fact that it was made while he was under arrest, and was sworn to by him: *Salas v. State*, 31 Tex. Crim. Rep. 485; *Jackson v. State*, 19 Tex. App. 458; *Alfred v. State*, 2 Swan, 581; *People v. Kelley*, 47 Cal. 125; *State v. Branham*, 13 S. C. 389; *State v. De Graff*, 113 N. C. 688.

Statements made by a prisoner under oath at a coroner's inquest are admissible against him on his trial for murder, although he knew at the time the statement was made that he would probably be arrested for the murder, and was informed by the coroner that rumors implicated him, and that he had a right to refuse to testify: *Teachout v. People*, 41 N. Y. 7. Such evidence is inadmissible, however, if the witness is not informed of his legal right and the fact that he is suspected of the crime under investigation: *State v. Young*, 119 Mo. 495. Voluntary statements made by a witness before a coroner's jury, which he requests the privilege of making to cast the guilt upon another, are admissible against him on his trial for murder: *State v. Wisdom*, 119 Mo. 539.

When a prisoner voluntarily confesses before an examining magistrate, whose duty it is to take the examination in writing, such writing alone, if producible, is evidence of the confession, and it cannot be proved by parol: *State v. Branham*, 13 S. C. 389; *Wright v. State*, 50 Miss. 332; *Cicero v. State*, 54 Ga. 156. But when such confession is duly reduced to writing, not so authenticated as to render it competent evidence, parol proof is admissible, after laying the proper predicate, to show the statements made by the defendant in his confession before the examining court: *Guy v. State*, 9 Tex. App. 161; *Brown v. State*, 71 Ind. 470. It is to be presumed that such confession was reduced to writing by the magistrate in the discharge of his official duty, and, when the official record of such confession is shown to have been lost, parol evidence of it is admissible: *Hightower v. State*, 58 Miss. 636.

When a confession made by a defendant in a deposition before a committing magistrate is offered in evidence a proper foundation for its introduction must be laid by preliminary proof, showing *prima facie* that it was voluntarily made, and the defendant is entitled, before it is received, to prove that it was not so made: *People v. Soto*, 49 Cal. 67. When a person, although he is subsequently charged with a crime, appears voluntarily and gives his testimony in relation thereto before any accusation has been made against him, his confession or statement made under oath is admissible against him on his trial: *Clough v. State*, 7 Neb. 320. Thus, on a trial for murder, statements made by the prisoner, as a witness before the coroner, before he had been charged with the crime, and before it was known that a murder had been committed, are admissible against him: *Hendrickson v. People*, 10 N. Y. 20; 61 Am. Dec. 720; *Williams v. Commonwealth*, 29 Pa. St. 102.

If a person confesses a killing before a coroner's jury, and the grand jury, under an agreement that such confession shall not be used against him if he testifies truthfully and fully on the trial of his accomplice, and before such trial escapes, and fails to so testify, his confession is admissible against him on his subsequent trial for the same crime: *State v. Moran*, 15 Or. 262.

A confession voluntarily made before a grand jury, touching an offense for which one is under arrest, may be given in evidence against him by members of such jury upon his trial for the crime: *State v. Carroll*, 85 Iowa, 1; *State v. Moran*, 15 Or. 262.

A plea of guilty by a person accused of crime before a committing magistrate is admissible in evidence against him as a confession on his trial for the same crime: *Commonwealth v. Brown*, 150 Mass. 330. This is especially true if such plea is voluntarily made after the accused is legally warned by the magistrate: *Rice v. State*, 22 Tex. App. 654.

What a witness voluntarily testified to at a former trial of another party for a crime is admissible against him as an admission on his trial for the same crime: *Burnett v. State*, 87 Ga. 622; *Dickerson v. State*, 48 Wis. 288.

This statement is refuted, and the contrary doctrine maintained, in *Josephine v. State*, 30 Minn. 613; *Jackson v. State*, 36 Minn. 311.

Statements voluntarily made by a defendant in a criminal case at a former trial are admissible in evidence against him as admissions: *People v. Arnold*, 43 Mich. 303; 39 Am. Rep. 182; *State v. Eldings*, 71 Mo. 545; 36 Am. Rep. 406; *State v. Jefferson*, 77 Mo. 136; *Dumas v. State*, 63 Ga. 600; *State v. Glass*, 39 Wis. 218; 36 Am. Rep. 845; *People v. Kelly*, 47 Cal. 125; *Commonwealth v. Brynolds*, 122 Mass. 454; and may be proved by the judge of the court in which the first trial was conducted: *State v. Duffy*, 57 Conn. 525.

A sworn confession made by a defendant long anterior to his trial, and not preliminary thereto, is admissible in evidence against him: *United States v. Brown*, 40 Fed. Rep. 457.

*When not Admissible.*—Confessions made by a person accused of crime at his preliminary examination, or in other judicial proceedings while he is under oath, without his being informed of his legal rights, or that statements or confessions made by him may be subsequently used against him, are not considered voluntary, and are not admissible in evidence against him on his subsequent trial for the same crime. In other words, when an accused is compelled to answer questions under oath, put to him by a committing magistrate, touching his supposed connection with the crime then under investigation, without his being informed of his legal rights and the effect of his replies, his admissions or statements are not admissible against him on his trial: *Coffey v. State*, 25 Fla. 501; 23 Am. St. Rep. 525, and note 537; *People v. Mondon*, 103 N. Y. 211; 57 Am. Rep. 709; *People v. McMahon*, 15 N. Y. 384; *United States v. Williams*, 1 Cliff. 5; *Peter v. State*, 4 Smedes & M. 31; *United States v. Bascadore*, 2 Cranch C. C. 30; *United States v. Duffy*, 1 Cranch C. C. 164; *Walker v. State*, 28 Tex. App. 112; *Commonwealth v. Harman*, 4 Pa. St. 269; *Schoeffler v. State*, 3 Wis. 823; *State v. Rorie*, 74 N. C. 148; *State v. Matthews*, 66 N. C. 106. A plea of guilty, offered by a defendant charged with murder, but refused by the court, cannot be given in evidence against him on the trial: *State v. Meyers*, 99 Mo. 107.

**CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY OF.**—To warrant a conviction on circumstantial evidence alone, the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no one else, committed the offense charged: *Carlton v. People*, 150 Ill. 181; ante, p. 346, and note, with the cases collected.

**CASES**  
**IN THE**  
**SUPREME JUDICIAL COURT**  
**OF**  
**MAINE.**

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**NOTT v. OWEN.**

[86 MAINE, 92.]

**COTENANCY—RIGHT OF PART OWNER TO TERMINATE TENANCY OF HIS PART.**

When a building owned in common is occupied by a tenant of the different co-owners under separate agreements between them and himself, one of such owners of an undivided one-fourth interest in the building cannot arbitrarily terminate the tenancy as to his share in the premises by raising the rent thereon, and, if the tenant necessarily continues to occupy the whole building, he is liable to such part owner only for reasonable rent for the beneficial use of his share of the premises.

*R. H. Nott*, for the plaintiff.

*J. O. Bradbury*, for the defendant.

92 PETERS, C. J. The plaintiff, representing the ownership of one undivided quarter of a store, had rented his quarter at the same rate that the other quarters were rented, there being separate contracts between the different owners and the tenant. Becoming dissatisfied with the amount of rent so received, he undertook to terminate the tenancy as far as his undivided quarter was concerned, and notified the tenant that if he occupied his share of the premises after a certain date the rent would be at an increased rate, and that the tenant's continued occupation would be regarded as an acceptance on his part of the new terms proposed. As the tenant did not acquiesce in the proposal of the plaintiff, this suit is brought to recover the amount of rent claimed by the plaintiff, the defendant persisting in a continued occupation of the whole property in pursuance of contracts with the other owners.

The plaintiff's proposition that the tenant cannot rightfully

occupy the store at all unless there be an agreement with him for the occupancy of his one-quarter is far from tenable. Were he a sole owner he could manage his own property in his own way. But, as an owner of property in common with other owners, he is not entitled to dictate the management of their interests, as well as his own, without their consent. The error of the plaintiff lies in regarding the tenant as in possession of the store under <sup>199</sup> some agreement with him. The defendant is forbidden by the plaintiff to be his tenant. He is occupying the premises by virtue of an agreement with the other owners, and in occupying their undivided shares he necessarily occupies the whole store, and for the beneficial use of the plaintiff's share of the same he becomes liable to pay him a reasonable rent therefor.

Were it otherwise any tenant in common would have the power by his perverseness to actually destroy the valuable use of the common property. The plaintiff is really in more controversy with his co-owners than with the occupant of the store. The law frowns upon the idea of any such despotic power being possessed by an owner in common over the common property.

The plaintiff has already received rent at the same rate as that received by his co-owners, which he credits in partial payment of his claim, while we think it should be in full satisfaction thereof. He has already received a reasonable rent.

Plaintiff nonsuited.

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ACTION FOR USE AND OCCUPATION: See note to *Fitzgerald v. Beebe*, 46 Am. Dec. 289, 290; *Hofar v. Dement*, 5 Gill, 132; 46 Am. Dec. 628.

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## BRIARD v. GOODALE.

[86 MAINE 100.]

**APPELLATE PRACTICE.**—An appeal must be dismissed unless the appellant's right to appeal is affirmatively established by the case presented.

**APPELLATE PRACTICE—WHO MAY APPEAL.**—Under a statute giving the right of appeal to any person aggrieved by a probate decree the only persons who may exercise such right are those who have rights which may be enforced at law and whose pecuniary interest may be established in whole or in part by the decree.

**APPELLATE PRACTICE.**—An appeal by a sister from a probate decree appointing a guardian for her sister as a person of unsound mind, which neither specifies any reason for the appeal nor alleges in the exceptions that the appellant is an heir apparent or an heir presumptive of the ward, and which fails to show affirmatively that the appellant is legally interested in the ward's estate, should be dismissed.

*R. H. Nott*, for the appellant.

*John M. Goodwin*, for the appellee.

<sup>101</sup> WHITEHOUSE, J. This is an appeal from the decree of a judge of probate appointing a guardian to a person of unsound mind. The appellant is a sister of the ward, and the presiding justice ruled that she was not a person aggrieved by the decree within the meaning of section 23, chapter 63, of the Revised Statutes. The case comes to this court on exceptions by the appellant.

Unless the appellant's right to appeal is affirmatively established by the case presented the appeal will be dismissed: *Pettingill v. Pettingill*, 60 Me. 419; *Deering v. Adams*, 34 Me. 41.

"The persons indicated by the statute under the term 'aggrieved' are not those who may happen to entertain desires on the subject, but only those who have rights which may be enforced at law, and whose pecuniary interest might be established in whole or in part by the decree": *Deering v. Adams*, 34 Me. 41, and cases cited.

With respect to the petition of a guardian for the sale of his ward's estate it is provided by section 25, chapter 71, of the Revised Statutes, that "all heirs apparent or presumptive of the ward shall be considered interested in the estate"; and in *Lunt v. Aubens*, 39 Me. 392, it was held that an heir presumptive of the ward was entitled to have an appeal from a decree appointing a guardian.

But in the case at bar it is neither specified in the reasons for the appeal nor alleged in the exceptions that the appellant is either an heir apparent or an heir presumptive of the ward. It is stated in the exceptions that she is a sister of the ward; but *non constat*, that a sister is an heir. There may be nearer relatives; the ward may have children living. It is neither alleged nor proved that the appellant is an heir. It does not <sup>102</sup> affirmatively appear from the case presented that the appellant is legally interested in the ward's estate. It is not established that she is "aggrieved" within the meaning of the statute or the purview of the authorities cited.

All questions of fact involved in the case were finally determined by the presiding justice. His ruling upon the question of law presented was undoubtedly correct.

The appeal being a nullity, the court has no jurisdiction to



affirm or reverse the decree: *Gray v. Gardner*, 81 Me. 558; *Milliken v. Morey*, 85 Me. 342. The entry must accordingly be, exceptions overruled. Appeal dismissed.

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PARTY AGGRIEVED and having a right of appeal from a decree is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested thereby: *Wiggin v. Scott*, 6 Met. 194; 39 Am. Dec. 716.

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## STATE v. EDWARDS.

[38 MAINE, 102.]

**MILLS—TOOL FOR GRINDING GRAIN—USURY.**—The owner and operator of a public gristmill is bound to receive all grists of grain tendered to be ground, and to grind for the toll specified by statute. Any agreement for toll in excess of that fixed by the statute is usurious and void.

**CONSTITUTIONAL LAW—REGULATION OF PUBLIC GRISTMILLS.**—An owner of a gristmill who makes his mill public, and assumes to serve the public, thereby dedicates his mill to public use, and it becomes subject to legislative regulation and control so long as it remains public.

**CONSTITUTIONAL LAW.**—REGULATION OF PUBLIC GRISTMILLS is within the legislative power. A statute specifying the amount of toll that may be charged for grinding grain at such mills is constitutional and valid.

*C. F. Daggett*, county attorney, for the state.

*L. C. Stearns*, for the defendants.

103 HASKELL, J. The defendants were convicted under the Revised Statutes, chapter 57, sections 5 and 6, as amended by the act of 1885, chapter 332, on two several counts: 1. Of refusing to receive grain at their gristmill there tendered to be ground; 2. Of taking excessive toll. The defendants have exception to the ruling of the court that they were bound to receive the grists of grain offered, and grind the same for the toll specified by the statute, and that an agreement for toll in excess of that fixed by statute would be no defense.

The case does not show what kind of a mill the defendants operated, nor whether it was a public or private mill, nor whether it was a water-mill, steam-mill, or windmill. It assumes, however, that it was a gristmill, used for grinding grain for the public.

Exceptions must show sufficient facts to make the ruling erroneous: *Reed v. Reed*, 70 Me. 504. In this case, therefore, if the ruling excepted to be correct, and the statute under which the conviction was had be constitutional when ap-

plied to any kind of a gristmill, judgment must be entered <sup>104</sup> on the verdict. And it may be assumed that defendants' mill was a public gristmill, propelled by a head of water obtained under authority of the mill act: Rev. Stats., c. 92.

Assuming the mill to be a public mill, and the statute under which the conviction was had to be valid, an agreement between the owner of the grain and the defendants, for toll in excess of the statute quantity, can be no defense. The act of the defendants in taking excessive toll was just as much in defiance and violation of the statute, when taken by agreement with the owner of the grist, as if taken without his consent. The defendants' act is prohibited by the statute. They were required to run their public mill for statute toll, with equal dispatch for all the patrons of their mill. They were required to receive grists and grind them in their turn, without motive for unequal dispatch to those willing to pay an extra price for it. The taking of usury by agreement with the borrower of money is analogous. Freedom from blame on the part of the lender is not a bar to the borrower's right to recover back the usury: *Houghton v. Stowell*, 28 Me. 215. The statute under which the conviction was had imposes no such condition.

But it is stoutly asserted that the statute is unconstitutional as an invasion of the private right of enjoyment of property. The mill act of Maine applies to all water-mills; and whether its validity results from the exercise of eminent domain, as supposed by many cases—*Jordan v. Woodard*, 40 Me. 317; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221; and others cited by Gould on Waters, sec. 253, and by the supreme court in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9—or from the proper regulation of the rights of riparian owners, so as to best serve the public welfare, having due regard to the interests of all, as held in *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, and in *Murdock v. Stickney*, 8 Cush. 113, and remarked by the court in *Lowell v. Boston*, 111 Mass. 466, 15 Am. Rep. 39, it is unnecessary now to consider.

It is conceded by all authorities that the public use of property by the individual is within the scope of legislative control. And it matters not whether the use be authorized by express statute <sup>105</sup> or dedicated by the individual proprietor. If it be a public use it is within the supervision and control of the legislature. The troublesome question is, Whether the use

be public: *Tyler v. Beacher*, 44 Vt. 648; 8 Am. Rep. 898. In most branches of business the public has an interest. That interest varies according to the surrounding conditions of the particular business in question. If it be a monopoly, the interest of the public to be fairly and conveniently served is much greater than when the monopoly ends by force of wholesome competition. A distinction must be made between a public use and a use in which the public has an interest. In the former case the public may control, because it is a use within the function of government to establish and maintain. In the latter case it is a private enterprise that serves the public, and in which it is interested to the extent of its necessities and convenience. The former is clearly within the control of the legislature, while the latter may not be. Many authorities, however, go to that extent: *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, and cases cited. The public is interested to be well and reasonably served at the store of the tradesman, the shop of the mechanic, and the office of the professional man, and yet all these vocations are private. The goods on sale in the store, material furnished by the mechanic, and the skill employed by the professional man, are the individual property of each one respectively. Their vocations are exercised for their own gain, and they have a right to the fruits of their own industry without legislative control. It must not be understood that each one may not be properly subjected to suitable police regulations as to the manner of his business: 2 Kent's Commentaries, 340; but the business cannot be thereby controlled and the profits to be gained therefrom destroyed, taken away, or limited by the establishment of prices; otherwise we should have a paternal government that might crush out all individual liberty, and the declaration of our constitution would become as valueless as stubble.

It is conceded by all authorities that common carriers, common ferries, common roads, common wharves, common telegraphs, and common telephones, etc., and common grist-mills, and <sup>106</sup> common lumber-mills are of that public nature to be put under public control, whether operated under the authority of charters from the state or by individual enterprise. Each of those cases is within the function of government to establish and maintain, and, therefore, to control, by whomsoever exercised: *Blair v. Cuming County*, 111

U. S. 363; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307; *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418.

Mills for the grinding of grain and for the sawing of lumber for all comers have been aided or established by the legislature from the earliest colonial times. Those mills were usually water-mills; but it is of no moment what the propelling power may be: *Burlington v. Beasley*, 94 U. S. 310. They have always been considered so necessary for the existence of the community that it was proper for government to foster or maintain them; and, in the absence of government aid, the individual proprietor, not pretending to serve the public, might maintain such mills as private mills, free from legislative interference, precisely as he might maintain a store, shop, or other private business; but when such proprietor makes his mill public, assumes to serve the public, then he dedicates his mill to public use, and it becomes a public mill, subject to public regulation and control. He is not compelled to continue such public use, but, so long as he does, he becomes a public servant, and may be regulated by the public.

In the present case the mill must be considered a public mill, and rightfully within legislative control. No suggestion is made that the statute regulation is unreasonable, and, therefore, it is unimportant to consider whether the reasonableness of the statute regulation be a legislative or judicial function.

Exceptions overruled. \_\_\_\_\_

GRISTMILLS AND OTHER MILLS AS PUBLIC USES: See *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221, and note 229, and conflicting decisions considered in the monographic note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 699-703.

## MANSFIELD v. MCGINNESS.

[86 MAINE, 118.]

**COTENANCY—ADVERSE POSSESSION.**—As between cotenants evidence of long continued, visible, uninterrupted, and even exclusive occupation by one cotenant does not bar the rights of the others. To constitute an adverse possession in such case there must be an actual ouster, and an exclusion of the other cotenants by the one in possession.

**ACTION** in the nature of waste. The statute under which it was prosecuted authorized the recovery of treble damages. Verdict for defendant. Motion to set aside the verdict as against law and the weight of evidence.

*J. Williamson and Son*, for the plaintiffs.

*W. P. Thompson*, for the defendant.

**118 EMERY, J.** This is a statute action (Rev. Stats., c. 95, sec. 5) by one tenant in common of an undivided tract of land, against a cotenant for cutting trees upon the land without giving previous notice. The defendant claims to have disseised the plaintiff, and thus to have acquired a title to the whole tract by an adverse possession for more than twenty years.

There is a manifest difference in character between the **119** possession of a stranger and that of a cotenant. A stranger has no right of possession. His occupation, therefore, would be in itself some evidence of an adverse claim, at least in the absence of any evidence of license. A landowner seeing indications of occupation by a stranger would be on his guard against the nature of the stranger's claim. A cotenant, on the other hand, has full right of possession of the whole undivided land. His occupation, therefore, would not be the slightest evidence of any adverse claim. It would be presumed to be in accordance with his right as part owner. A tenant in common, seeing indications of occupation by a cotenant, would have no reason to apprehend a denial of his own equal right.

As between cotenants, evidence of long continued, visible, uninterrupted, and even exclusive occupation by one cotenant, is not enough to bar the rights of the other cotenants. There must be evidence from which an ouster, a putting out, and a keeping out, of the other cotenants can be inferred.

This was a small tract of land only about four acres in extent. It was unequally divided by a small stream of water, leaving about three-quarters of an acre on the east side and

three acres or more on the west side. Neither parcel had been inclosed by fences. The defendant and her predecessors in title had paid the taxes on the whole lot. They had cleared the east side parcel, and taken the grass annually for their own use. The west side parcel, the larger parcel, was covered with a growth of wood and small timber. On this west side the defendant and her predecessors had cut wood and hoop-poles in small quantities from time to time. They had also occasionally cut small timber, and at one time some pump-sticks. They did not cut any large quantity at any one time, until the occasion of bringing this suit. This parcel does not appear to adjoin the homestead of the defendant, nor to be a part of her farm.

Whatever may be the case as to land on the east side of the stream the defendant clearly has not shown by the above evidence an ouster of the plaintiff from the west side, where the cutting complained of was done: *Thornton v. York Bank*, 45 Me. 158; *Hudson v. Coe*, 79 Me. 93, 94; 1 Am. St. Rep. 288.

Motion sustained. New trial granted.

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ADVERSE POSSESSION AS BETWEEN COTENANTS.—NECESSITY OF ACTUAL OUSTER TO CONSTITUTE: See *Cook v. Clinton*, 64 Mich. 309; 8 Am. St. Rep. 816, and note; *Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579, and note; *Holley v. Hawley*, 30 Vt. 525; 94 Am. Dec. 350, and note.

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## FRENCH v. ROBINSON.

[86 MAINE, 142.]

INSOLVENCY—DISCHARGE AS BAR TO JUDGMENT ON ASSIGNED CLAIMS.—A discharge in insolvency is a bar to an action against the insolvent on a judgment recovered by an assignee in his own name on notes held by a firm residing outside the state and assigned to such assignee for collection in his own name for the benefit of the firm.

*E. S. Clark*, for the plaintiff.

*G. R. Fuller*, for the defendant.

143 PETERS, C. J. The plaintiff sues upon a judgment, recovered in his own name, against the defendant who, since the judgment was recovered against him, has been discharged from his debts and liabilities by proceedings in insolvency. The plaintiff claims that he is entitled to recover in this action, notwithstanding the defense of insolvency, because

the real ownership of the judgment never was in himself, but was in the firm of Eaton Brothers, who, during the period of insolvency proceeding, were, and ever since have been, residents and citizens of the Province of New Brunswick. It appears that the original demand which went to judgment was a note of hand given by the defendant to Eaton Brothers, and that they assigned the same to the plaintiff for a nominal consideration in order to enable the plaintiff, their attorney, to sue and collect the demand in his name.

Had the judgment been recovered in the name of Eaton Brothers the defendant's discharge would not be a defense against it or against a suit in their names thereon. But, on the facts as before stated, we are of opinion that the defense of insolvency is a bar to the present action. The legal creditor is the plaintiff. The equitable owners intrusted the legal title to <sup>144</sup> him. They were seeking some supposed advantages by that act, and should suffer any disadvantages as well. The insolvency court deals with the legal owners of demands ordinarily. If equitable owners of claims can maintain suits when the legal owners thereof are barred by the defendant's insolvency difficult questions would be found occurring in the settlement of insolvent estates, which this decision may prevent.

Exceptions overruled. —

WHAT DEMANDS MAY BE DISCHARGED UNDER STATE INSOLVENT LAWS:  
See monographic note to *Norton v. Cook*, 23 Am. Dec. 347-352.

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## CITY OF DEERING v. MOORE.

[86 MAINE, 181.]

**OFFICIAL BONDS—FAILURE TO SIGN—LIABILITY OF SURETY.**—Failure of a principal to sign his official bond conditioned for the faithful performance of his official duty does not render it void nor release the surety from liability thereon.

**OFFICIAL BONDS—LIABILITY OF SURETIES—CONTRIBUTION.**—Sureties on an official bond who bind themselves severally to pay a certain sum named therein are bound to contribute to each other, so that all shall fare alike. The discharge of one by other than a sealed instrument on part payment of his liability does not release all, although a discharge by sealed instrument would have that effect.

*G. C. Hopkins*, for the plaintiff.

*C. P. Mattocks and L. Barton*, for the defendant.



<sup>183</sup> HASKELL, J. Debt by an obligee against a surety upon two bonds, given by a collector of taxes for the years 1884 and 1885 respectively. The last bond was not signed by the principal. Each surety bound himself severally, and not jointly, in the sum of five thousand dollars. The obligee received from two sureties a sum of money "in full discharge from liability upon each bond." Two questions are presented:

1. Did the failure of the principal to sign the last bond render it void? We think not. The bond was conditioned that the principal should faithfully perform official duty. This he was bound by law to do, just as effectually as if he had covenanted to do it by signing the bond. The engagement of the surety, therefore, rested upon the legal obligation of the principal already incurred. It is not like the cases, often referred to, where no obligation attaches to the principal outside of the bond itself. In those cases, the principal not being bound, it would be unjust to hold the surety. Nor is it like the case of bail, where the sureties have peculiar rights flowing from the stipulation agreed to by the principal. The bond must be held good at common law: *Howard v. Brown*, 21 Me. 385; *Scarborough v. Parker*, 53 Me. 252; *Goodyear etc. Co. v Bacon*, 148 Mass. 542.

2. Did the discharge of two sureties release the defendant, another surety? No. The defendant was one of six sureties who bound themselves severally and not jointly, each in the sum of five thousand dollars. Their relations to each other are precisely the same as if each one had executed a separate bond. They are neither necessarily joint debtors nor joint sureties. Had the <sup>184</sup> principal executed the bond he would have bound himself in the sum of thirty thousand dollars. The sureties, instead of standing in jointly for that amount, divided it equally among them, and each one became severally bound for his aliquot share. They are sureties for the principal, and may or may not be called upon to bear a common burden as circumstances may require. If they are (that is, if the whole liability be less than the aggregate amount assumed by all of them, it becomes a common burden, not by reason of any contract or engagement to indemnify each other, but on the principle of equity, that a common burden shall be equally borne by all), they become cosureties, and stand in relation to each other as joint debtors, and are bound to contribute to each other, so that they shall all fare alike. In cases of this sort, of course, none can be charged

beyond the amount that he has stipulated for: *Warner v. Morrison*, 3 Allen, 567. It follows, therefore, that the release of one would work the release of all. That is based upon the presumption of payment, the seal being conclusive evidence of complete and ample consideration. To work the discharge of a debtor the agreement must be made upon sufficient consideration, and that pays the debt. At common law the part payment of a debt is not sufficient consideration for its discharge: *Bailey v. Day*, 26 Me. 88; *Potter v. Green*, 6 Allen, 442. If the discharge be by a sealed instrument it is of no consequence what the actual consideration may be, for the seal is conclusive evidence of sufficient consideration. By the statute of this state, passed in 1851, chapter 213 (Rev. Stats., c. 82, sec. 45), the settlement of a demand upon the receipt of money or other valuable consideration, however small, will bar an action upon it. It should be observed that the demand must be settled in order to effectuate that result. The discharge of a debtor from liability upon a demand that is to remain outstanding will not so operate. This distinction applies where one or two joint debtors is discharged upon the consideration of part payment, leaving the demand outstanding against the other. Such discharge will not bar an action against both, nor can it be pleaded by the other in an action against him if the liability be several: *First Nat. Bank v. Marshall*, 185, 73 Me. 79; *Drinkwater v. Jordan*, 46 Me. 432; *McAllester v. Sprague*, 34 Me. 296.

In the case at bar the attempted discharge of some of the sureties is not pretended to have been by a sealed instrument. Had it been it would have worked a discharge of all the sureties, for they stand in the relation to each other of joint debtors, being cosureties for the payment of the same debt. Nor does it pretend to have discharged the whole debt, as provided for by statute. It simply presumes to discharge some sureties from a liability or debt that was to remain outstanding, and therefore, not being upon sufficient consideration, that would have paid the debt, or so much of it as they had engaged to pay by their covenant, nor evidenced by a sealed instrument, it was ineffectual to discharge any one.

The result is, damages upon the last bond should be assessed in a sum equal to the existing default of the principal, with interest from the time it accrued, leaving the defendant to such claims for contribution as shall prove just.

Defendant defaulted. Damages to be assessed below.

**SURETYSHIP—FAILURE OF PRINCIPAL TO SIGN OBLIGATION—EFFECT ON SURETY.**—A bond of indemnity purporting to be the bond of the plaintiff in the action as principal and two other persons as sureties, stipulating that the parties would save the constable harmless from a claim made to property levied upon by him, though not signed by such principal, is binding upon the sureties: *Woodman v. Oalkins*, 13 Mont. 363; 40 Am. St. Rep. 449, and note.

**SURETYSHIP—CONTRIBUTION BETWEEN SURETIES.**—This subject is fully discussed in the monographic note to *Gross v. Davis*, 10 Am. St. Rep. 639-647.

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## SMITH v. HOWARD.

[86 MAINE, 208.]

**PROBATE COURTS ARE TRIBUNALS OF SPECIAL AND LIMITED JURISDICTION**, and can exercise only such powers as are directly conferred upon them by statute, and such as may be incidentally necessary to the execution of these powers.

**FOREIGN EXECUTORS AND ADMINISTRATORS—LETTERS OF ADMINISTRATION** have no legal force or effect beyond the territorial limits of the state in which they are granted.

**ESTATES OF DECEDENTS—DISTRIBUTION—CONFLICT OF LAWS.**—The disposition, succession to, and distribution of personal property wherever situated is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the property is situated.

**ESTATES OF DECEDENTS—WIDOW'S ALLOWANCE—CONFLICT OF LAWS.**—A widow's claim for allowance is not a matter of legal right. It rests in the discretion of the probate court, and, when such claim for an allowance from the personal property of the husband is presented, the question must be determined and the amount regulated by the law of the place where the family had their home at the time of the husband's death.

**ESTATES OF DECEDENTS—WIDOW'S ALLOWANCE—CONFLICT OF LAWS.**—A probate court of one state has no jurisdiction to decree an allowance to a widow of a nonresident decedent from assets within its jurisdiction on which there is ancillary administration. A widow's claim for allowance is not only controlled by the law of the state where the husband resided at the time of his death, but it must also be granted by the probate court of that state.

*J. Williamson*, for the appellant.

*R. F. Dunton*, for the appellee.

204 WHITEHOUSE, J. This is an appeal from the decree of a judge of probate allowing the account filed by the defendant, as administratrix on the estate of her husband, whose domicile was in Massachusetts at the time of his death. The appellants are the children and heirs of the decedent, and

the only item in the account to which they object is a credit of seven hundred dollars, being the amount granted to the widow, as her allowance, by the judge of probate in this state. The defendant took out the ancillary administration in this state, in May, 1892, on personal property <sup>205</sup> amounting to eight hundred and fifty dollars. In June of the same year she took out the principal administration in the place of the domicile of the decedent; but the entire estate in that jurisdiction, small in amount, was exhausted in effecting a settlement by compromise with the creditors in that state. No allowance was made to the widow, or applied for by her, in Massachusetts. The allowance in question was made by the judge of probate in this state in July, 1892.

The only question presented by the agreed statement, accompanying the appeal, is whether the judge of probate in this state had jurisdiction and authority to decree this allowance to the widow of a nonresident decedent from assets in this jurisdiction on which there is ancillary administration.

In determining this question, a new one in this state, it is proper to be reminded that courts of probate are tribunals of special and limited jurisdiction only. They are wholly creatures of the legislature. They exercise only such powers as are directly conferred upon them by legislative enactment, and such as may be incidentally necessary to the execution of these powers. Unless authority for the exercise of jurisdiction in a given case can be found in the statutes, given either expressly or by implication, the proceeding is void: *Woerner's American Law of Administration*, sec. 142; *Fowle v. Coe*, 63 Me. 248.

It is furthermore important to observe that, in order to discover the true scope and purpose of statutes defining the powers of these courts, they are to be examined in the light of the common law, which it may be supposed they were intended to modify, affirm, or supersede, or by which their practical operation might be affected. In this case it is proper to consider that the statutes of every state are enacted primarily with reference to the citizens within its own jurisdiction; that it is the right of a state to pass laws for the appropriation of any property of a decedent within its limits to the payment of the just claims of creditors residing there, even if not in entire harmony with the spirit of comity between states; and that letters of administration have no legal force or effect beyond the territorial limits of the state

in which they are granted: *Saunders* <sup>206</sup> v. *Weston*, 74 Me. 92; *Smith v. Guild*, 34 Me. 448; Story's Conflict of Laws, sec. 512. These statutes are also to be construed with due regard to the universal rule which Chancellor Kent declares to be as "settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated: 2 Kent's Commentaries, 571; *Gilman v. Gilman*, 53 Me. 184; Wharton on Conflict of Laws, secs. 604, 627. The principle last stated, as will presently be seen, is expressly recognized and affirmed in our statutes: Rev. Stats., c. 65, sec. 36.

In the subdivision of chapter 65 of the Revised Statutes, entitled, "Allowances to widows and others," is the following in section 21: "In the settlement of any intestate estate, or of any testate estate which is insolvent, or in which no provision is made for the widow in the will of her husband, or when she duly waives the provisions made, the judge may allow the widow so much of the personal estate, besides her ornaments and wearing apparel, as he deems necessary, according to the degree and estate of her husband, and the state of the family under her care." The last subdivision of this chapter is entitled, "Distribution of the estates of deceased nonresidents." In the first section of it (sec. 36) is the following: "When administration is taken in this state on the estate of any person, who at the time of his death was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will, . . . if he left any; but if not, . . . his personal estate shall be distributed according to the laws of the state or county of which he was an inhabitant; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile." These are modified forms of <sup>207</sup> the original enactments of 1821 (c. 51, secs. 8, 39), which were adopted from Massachusetts. In that state the corresponding statutes were enacted at different periods, that relating to ancillary administration, in the form as adopted, having

been enacted in Massachusetts in 1818. None of the enactments providing for administration on the estates of deceased nonresidents in Maine or Massachusetts at any time contained any express reference to a widow's allowance.

It is manifest from the history of these two sections in our Revised Statutes above quoted, and their present collocation in chapter 65, as well as from a comparison of their respective terms and provisions, that section 21 has reference solely to the estates of deceased residents. It was not designed to embrace the estates of deceased nonresidents. With respect to the latter, the jurisdiction of the court of probate is clearly defined and limited in section 36. In case of an intestate it is simply the duty of the judge to order the residue of the estate, after the payment of debts, to be distributed here, or transmitted to the foreign administrator, to be distributed, in either event, according to the law of the place where the deceased had his domicile. So long as there are creditors within the jurisdiction of the ancillary administration they have a legal right to insist upon having all the assets found there appropriated to the payment of their debts. The court has no authority to order the assets to be transmitted under this statute until the creditors here are all paid, and it has no jurisdiction to determine that there are no unpaid creditors here until the expiration of the time fixed by law for presenting their claims: *Newell v. Peaslee*, 151 Mass. 601; 1 Woerner's American Law of Administration, sec. 167. For aught that appears all the assets inventoried in this jurisdiction may yet be required to pay the claims of creditors residing here.

No authority to make an allowance to the widow of such nonresident decedent is expressly conferred by this section; nor is it granted by implication as necessary to the discharge of the duties that are expressly imposed. A widow's claim for an allowance is not deemed a matter of legal right either in this <sup>208</sup> state or Massachusetts. It rests merely in the discretion of the judge of probate: *Kersey v. Bailey*, 52 Me. 198; *Dale v. Hanover Nat. Bank*, 155 Mass. 141. It is not a fixed and absolute interest in the estate: *Additon v. Smith*, 83 Me. 554; *Adams v. Adams*, 10 Met. 170. It is not a debt due from the estate, nor a distributive share of it. It is not included in the "expenses of administration": *Washburn v. Hale*, 10 Pick. 429.

The widow's allowance was originally designed to afford a

temporary supply for the widow and her family pending the settlement of the estate. It had its origin in a humane and beneficent public policy that seeks to encourage the continuance of the family relations by providing against the exigencies arising from the death of the head of the family: *Kersey v. Bailey*, 52 Me. 198. When, therefore, a claim for such an allowance from the personal property of her husband is presented by the widow it is held with substantial uniformity that the question must be determined and the amount regulated by the law of the place where the family resided and had their home at the time of the husband's death: *Gilman v. Gilman*, 53 Me. 184; *Shannon v. White*, 109 Mass. 146; 1 Wœrner's Law of Administration, sec. 89. It is conceded by the defendant that such is undoubtedly the law; but it is still contended that without express statutory provisions, after the analogy of the distribution of the assets, and, as a matter of comity, the allowance in question was properly granted by the court in this state, and should be sustained if made in accordance with the law of Massachusetts. Whatever may reasonably be urged *ex comitate* in favor of such a practice in the courts of the *situs*, in cases where there are no debts towards domiciliary jurisdictions, where the amount of the allowance is definitely fixed by statute, serious difficulties are encountered in attempting to apply it here.

Section 2 of chapter 135 of Public Statute of Massachusetts is made a part of the agreed statement, and is as follows: "Such parts of the personal estate of a deceased person as the probate court, having regard to all the circumstances of the case, may allow as necessary to his widow, for herself and for his family under her care, or, if there is no widow, to his minor ~~200~~ children, not exceeding fifty dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein for forty days after his death, shall not be taken as assets for the payment of debts, legacies, or charges of administration."

It will be seen that this statute differs in important particulars from the corresponding statute in this state. There, in case of a will, the allowance may be granted to the widow in addition to the provisions for her in the will: *Williams v. Williams*, 5 Gray, 24; here, by the terms of the statute it is contingent on her waiver of the provisions in the will. It is also manifest that in other respects the nature and office of



the allowance are essentially unlike in the two states. There the statute aptly illustrates the original purpose of the allowance, as stated above, while in this state the practical construction has been much more liberal, and the authority to grant an allowance is not confined to cases of mere temporary relief: *Kersey v. Bailey*, 52 Me. 198. In the recent case of *Dale v. Hanover Nat. Bank*, 155 Mass. 144, the court says upon this point: "As a result of a uniform line of authorities, the rule is established that the court has no right under the statute to attempt to modify the provisions of a will, or to change the course which property of an intestate takes under the statute of distribution, or to take the estate from creditors to provide for the future of an unfortunate widow who is left dependent on her own resources. The purpose of an allowance is to provide for the necessities of the widow and minor children for a short time, until they have an opportunity to adjust themselves to their new situation." This is strikingly at variance with the practical construction of the Maine statute; and if the defendant would avail herself of the rule of comity which she invokes, she should at least be able to make it affirmatively appear that the allowance was in fact made in accordance with the Massachusetts statute as construed by the courts of that state. It is not expressly stated, however, to have been made with any reference whatever to the Massachusetts <sup>210</sup> statute. On the contrary it may fairly be inferred, from the statement of the case, and from the comparatively large amount of the allowance, that it was made under the influence of the law and practice of our own state, as in ordinary cases of domiciliary administration here.

But if it be conceded that the judge of probate intended to make the allowance in accordance with the law of Massachusetts there are still insuperable objections to such a practice under circumstances like those here stated. In the first place it would be incompatible with the rights of creditors under the provisions of section 36 which require all debts to be paid before any of the assets can be remitted to the place of the domicile. In this case there may be no creditors in Maine; but that question has not yet been determined, as nearly a year yet remains within which the claims of creditors may be enforced.

Again, the domiciliary court is the appropriate one to determine the amount of the allowance. That is not fixed by the statute in Massachusetts, but is left entirely to the sound

discretion of the judge of probate. In performing this duty he is to have "regard to all the circumstances of the case." The social position of the husband at the time of his death, as indicating the demands which might be made on the widow; the style in which she has been accustomed to live, the amount of the estate, and the amount of her separate property, the length of their cohabitation, the size of the family under her charge, the place of residence, and the treatment of each to the other, and many other like considerations, may all be taken into the account in fixing the amount of the allowance: *Allen v. Allen*, 117 Mass. 27; *Hollenbeck v. Pixley*, 3 Gray, 521; *Washburn v. Washburn*, 10 Pick. 374; *Gilman v. Gilman*, 53 Me. 184; *Walker, Appellant*, 83 Me. 17. All these things can be more fully and correctly ascertained, and all branches of inquiry respecting them more easily prosecuted in the jurisdiction where the family had their home. Their social position and style of living can be better understood and appreciated in the community in which they have lived. "The place of the domicile is where we should look to ascertain the real condition of the decedent's affairs": <sup>211</sup> *McNichol v. Eaton*, 77 Me. 249. It appears that the decedent's domicile was in Waltham, in the state of Massachusetts, at the time of his death. It does not appear that he ever resided in Maine, or that the defendant has ever resided here either before or since the death of her husband. Her domicile was merged in that of her husband.

Another practical difficulty would be met in the application of such a rule of comity. If the defendant is entitled to have an allowance from the assets found in this state she would have an equal right to it in every other state in which personal property of her husband might be found. Embarrassing questions respecting the numerous claims that might be presented in different jurisdictions would thus inevitably arise.

The conclusion is that the judge of probate in this state had no authority to make the allowance to the widow on the facts stated, and that the item of seven hundred dollars was improperly allowed in the defendant's account.

Whether the defendant's situation would have been improved if she had obtained a decree for an allowance from the probate court of Massachusetts, with a representation of insufficient assets there to respond to it, and had then by proper application asked to have the claim satisfied from the

assets in this state, subject to the claims of creditors residing here, or whether further legislation authorizing such procedure would be necessary or expedient, are questions not before this court. The question before us has seldom arisen, and no decision involving the precise state of facts here presented has been brought to the attention of the court. But eminently respectable authorities involving a similar state of facts strongly support the views above stated. In *Richardson v. Lewis*, 21 Mo. App. 581, the domicile of the decedent and his family was in Illinois at the time of his death, and the widow obtained an order from the court there for the payment of an allowance under the laws of that state. There were insufficient assets in Illinois to satisfy the claim, but further assets were found in St. Louis. Thereupon the widow applied to the court in St. Louis for the allowance provided for by the laws of Missouri, and it was held that the <sup>212</sup> Missouri statutes authorizing such allowance had no application to the widows of nonresident decedents, and the application was denied. In the opinion by Judge Thompson the court says: "We rest our decision upon the universal principle of the common law that the succession of the personal property of a deceased person is governed exclusively by the law of his actual domicile at the time of his death. . . . The statutes invoked are a temporary provision for the widows of deceased persons analogous to the provisions of statutes exempting certain property of debtors from execution. The very nature of such an allowance precludes the idea that the widow can be entitled to it in any state except that of the husband's domicile; for otherwise she would be entitled to this exemption from the claims of his creditors in every state in which he might have personal property."

In *Medley v. Dunlap*, 90 N. C. 527, the decedent had his domicile in Arkansas at the time of his death. His widow soon after moved to North Carolina, and there applied for an allowance under the laws of that state. It was held that she was not entitled to it, but, in the opinion, the court says: "If the laws of Arkansas provide for such an allowance the plaintiff ought to have applied there and had her claim allowed and paid, or, if there were not sufficient assets to pay it there, then she might have her claim thus allowed, satisfied out of assets in this state, upon proper application to the administrator here. But she cannot reach the assets of her deceased husband here in any other way: See, also, *Simp-*

*son v. Cureton*, 97 N. C. 113; *Spier's Appeal*, 26 Pa. St. 238; *Shannon v. White*, 109 Mass. 146; *Woerner's American Law of Administration*, sec. 80. Appeal sustained.

**PROBATE COURTS—JURISDICTION.**—The proceedings for the administration of the estates of deceased persons and for their distribution are purely statutory. The court while sitting as a court of probate has no other powers than those given it by statute and such incidental powers as pertain to it for the purpose of enabling it to exercise the jurisdiction which is conferred on it: *Buckley v. Superior Court*, 102 Cal. 6; *ante* p. 125, and note.

**EXECUTORS AND ADMINISTRATORS—FOREIGN.**—A grant of administration has generally no operation outside of the state from whose jurisdiction it was derived: *Fugate v. Moore*, 86 Va. 1045; 19 Am. St. Rep. 926, and note. An executor can administer only upon property situate within the state from whose courts he derives his powers: *Succession of Packwood*, 9 Rob. (La.) 438; 41 Am. Dec. 341; *Glenn v. Smith*, 2 Gill & J. 493; 20 Am. Dec. 452, and note; *Burbank v. Payne*, 17 La. Ann. 15; 87 Am. Dec. 513, and note; *Schneller v. Vance*, 8 La. 506; 28 Am. Dec. 140; *Succession of Packwood*, 12 Rob. (La.) 334; 43 Am. Dec. 230, and note. See, also, the extended notes to *Ela v. Edwards*, 90 Am. Dec. 175; *Vaughn v. Barret*, 26 Am. Dec. 309, and *Doolittle v. Lewis*, 11 Am. Dec. 394.

**DISTRIBUTION OF PERSONAL ESTATE—CONFLICT OF LAWS.**—The law of the decedent's domicile governs the distribution of his personal estate: *White v. Tennant*, 31 W. Va. 790; 13 Am. St. Rep. 896, and note; *Cross v. United States Trust Co.*, 131 N. Y. 330; 27 Am. St. Rep. 597, and note. See, also, the extended notes to *Montgomery v. Milliken*, 43 Am. Dec. 518, and *Bryan v. Moore*, 13 Am. Dec. 349.

**ALLOWANCE TO WIDOW—DISCRETION OF COURT.**—Orders for an allowance out of the estate of a deceased person for the support of the widow during the settlement of the estate are within the discretion of the probate court: *Estate of Power*, 92 Mich. 106; *Freeman v. Probate Judge*, 79 Mich. 390; *North v. Van Tassel*, 84 Mich. 69; *Walker, Appellant*, 83 Me. 17; *Estate of Kingsley*, 93 Cal. 576.

**ALLOWANCE FOR WIDOW.—BY WHAT LAW GOVERNED:** See *Short v. Galway*, 83 Ky. 501; 4 Am. St. Rep. 168.

## MISSISSIPPI AND DOMINION STEAMSHIP COMPANY v. SWIFT.

[86 MAINE, 243.]

**CONTRACTS—WHEN COMPLETE.**—When parties enter in a general contract, and the understanding is that it is to be reduced to writing, or if it is already in a written form, that it is to be signed before it is to be acted on, or to take effect, it is not binding until it is so written or signed.

**CONTRACTS—WHEN COMPLETE—INTENTION.**—When one sought to be charged intends to close a contract prior to the signing of a draft thereof, or if he signifies such intention to the other party, he is bound by the contract actually made, though the written draft is not signed; but if he neither has closed, nor signified an intention to close, the contract until

it is fully expressed in writing and attested by signatures, he is not bound until such signatures are affixed. The burden of proof is upon the party claiming the completion of the contract before the written draft thereof is signed.

**CONTRACTS—WHEN COMPLETE—SIGNING.**—If the written draft of a contract is viewed by the parties thereto merely as a convenient memorial or record of their previous contract the fact that such draft is not signed by them does not affect the force of the contract; but, if it is viewed as a consummation of the negotiation, there is no contract until the written draft is finally signed.

**CONTRACTS—WHEN COMPLETE—EVIDENCE.**—If a written draft of a contract is proposed, suggested, or referred to, during the negotiations it is some evidence that the parties intended it to be the final closing of the contract.

**CONTRACTS—WHEN COMPLETE.**—When correspondence indicates that a formal draft of a contract was in the minds of the parties, or at least in the mind of the party sought to be charged, as the only authoritative evidence of a contract, and that he did not have, nor signify, any intention to be bound until the written draft had been made and signed, he is not bound until such draft is duly made and signed.

*Symonds, Snow, and Cook*, for the plaintiff.

*Savage and Oakes, F. Hutchinson, and C. Hale*, for the defendants.

250 EMERY, J. A full exposition of our judgment in this case requires an extended statement of the evidence and the authorities, notwithstanding constant effort at abridgment.

The plaintiff steamship company owned and operated a line of ocean steamships plying between Liverpool and Montreal in the summer and between Liverpool and Portland in the winter. The American agents of the company were David Torrance & Co., with offices in Montreal and in Portland. Three of the steamships were named respectively, *Sarnia*, *Oregon*, and *Vancouver*.

The defendants, Swift & Co., located at Boston, were large shippers of dressed meats from the United States to Europe. This kind of merchandise, being fresh meat, could not be shipped, stowed, and transported across the ocean like ordinary merchandise upon mere bill of lading. Its suitable transportation required that certain spaces in the steamship should be set 251 apart for its reception, refrigeration, and care during the voyage. This space was necessarily engaged for some time prior to the shipping, that it might be properly fitted up, and it was necessarily to some extent at the disposal of the shipper, and under his control during the term of the contract. There were two modes of refrigeration in

use, one by ice and a new one by the Kilbourn process, so called.

In this condition of affairs Torrance & Co., November 19, 1889, opened a correspondence with Swift & Co. relative to space on the company's steamers for the transportation of dressed beef. In the first letter, November 19th, Torrance & Co. advised Swift & Co. that they were prepared to negotiate for such space on the *Sarnia* and *Oregon*, and were prepared to offer such space at twenty shillings per forty cubic feet on those steamers, retaining liberty to substitute the *Vancouver*, for one of the others later on. There was no reply to this letter, and on January 19, 1890, Torrance & Co. again wrote, Swift & Co., naming the sailing dates of the various steamers and inviting bids. No reply being received, Torrance & Co., on February 6th, again invited the attention of Swift & Co. to the matter. Swift & Co., February 12th, wrote Torrance & Co. that one of their men would call upon them with reference to the matter. There seems, then, to have been some verbal conference, for, on March 3d, Torrance & Co. wrote that the Liverpool managers were not inclined to accept the price named by Swift & Co., and "would only agree to fix the ships, provided you are willing to pay twenty shillings, and take the space where we think it would be most profitable for the ship," and suggested that if Swift & Co. were inclined to do any thing on these terms they might communicate with either the Montreal or Portland house. March 24th Torrance & Co. again wrote (this time from Portland, the other letters having been from Montreal) that they would not be prepared to enter into a contract for the *Vancouver*, *Sarnia*, and *Oregon*, unless for one year, from Montreal in summer and Portland in winter, they reserving the right to withdraw the *Vancouver* in the winter.

The next day, March 25th, Swift & Co. wired in answer as follows: "Answering your letter, 24th, if accepted at once, we will take space in the three ships named, to be mutually agreed on at twenty shillings flat for summer navigation, we agreeing to continue shipments during the winter, if ships go from Portland or Boston, we paying your market price for beef space; as we are negotiating with other parties, would appreciate your answer at once." Torrance & Co. wired same day from Montreal as follows: "We cannot change offer already made by our Portland house under instructions from Liverpool." Their Portland house, on the next day, March

26th, wrote for an answer to their proposition. On March 27th Swift & Co. wired to the Portland house as follows: "Your favor of 26th just received. We accept your proposition of 24th on three steamers. Please confirm by wire."

In the mean time, between the 24th and 27th of March, Torrance & Co., not hearing from Swift & Co., began negotiations with other parties, and so informed Swift & Co. in answer to their telegram of the 27th. March 29th, Swift & Co. wired that they wanted the space, and thought it should be accorded to them. April 1st Torrance & Co. wired as follows: "The decision has been given in your favor, and the three ships mentioned are at your disposal. *Sarnia* expected Portland Thursday, will sail following Thursday." On the same day Torrance & Co. wrote that they had been relieved of their negotiations, and said, "We hasten to advise you that we are willing to contract with you for the three steamers on the terms already mentioned, and conditional on your putting in the cold-air blast instead of the ice, and we have wired you accordingly in these words, 'The decision has been given in your favor, and the three ships mentioned are at your disposal. *Sarnia* expected Portland Thursday, and will sail the following Thursday.' You can arrange with our Portland house in reference to the contract." . . . . To this telegram Swift & Co. wired answer as follows: "Your message received; thanks for same. Shall we refrigerate *Sarnia* by old process this trip, or wait till first of May and use Kilbourn machine. We have two machines to be delivered early in May." Torrance and Co. replied by wire same day, April 1st, <sup>253</sup> as follows: "Wait till May. We don't want old process." On April 5th Swift & Co. wrote as follows: "Your favor of April 1st received; replying to same will say we will arrange for fitting the three ships by the Kilbourn process as per your request. I notice you say, 'The *Toronto*, one of our steamers sailing between here and Liverpool all next season, is due at Portland on the 10th instant, and should sail about the 15th. We are open to negotiation for her if you are so inclined.' I suppose all next season means the coming summer navigation for Montreal. Will you kindly write us saying where this ship will sail from during next winter; if she is to be in the regular service we shall be pleased to negotiate with you."

Here the correspondence ceased for a time. In the mean time, about the last of March, Mr. Foster, agent of Swift & Co., visited the steamers in Portland, took measurements of



space in different steerages, and had some conversation with the company's marine superintendent about the location of spaces for refrigerators. He indicated what spaces he should want, but no express stipulation was made that he should have them, or would take them. Swift & Co. did nothing toward refrigerating any space, and the steamers carried cargo in all the steerages as usual, leaving no space unoccupied.

July 8, 1890, Swift & Co. wired as follows: "Have no copy of contract, please mail one to-day." On the same day Torrance & Co. replied as follows: "We must apologize for not having earlier sent you copy of the contract for dead meat space. We shall, however, mail it to you to-morrow without fail." The next day, July 9th, they further wrote as follows: "Owing to this being our English mail day we have been unable to put your contract in form as promised, but we will send it to you to-morrow." July 10th they wrote again as follows: "We now inclose you copy of our proposed contract which we trust may be found to be in accordance with the understanding arrived at last March. We must apologize for not sending this yesterday, but as it was our mail day we were more than busy, and this must be our excuse. We trust you may soon be prepared to begin your shipments." The draft of contracts inclosed was quite long. <sup>254</sup> The only date on the draft was "Montreal, 1890." This draft was never signed.

July 24th Swift & Co. wired that they could not use Kilbourn process and must use ice, and inquired if that would be satisfactory. July 26th Torrance & Co. replied by wire as follows: "Have cable authorizing you using ice, but the other preferred. Can you refrigerate *Vancouver*? Will be here to-morrow. Sails Wednesday week."

Swift & Co. replied on July 28th that they could not refrigerate the *Vancouver*, and that their Mr. Foster would call on Torrance & Co. Wednesday morning. At this point the draft of contract had not been signed. Swift & Co. had taken no spaces, and had made no shipments. The company had set apart no spaces, but had filled them as usual with cargo.

This state of affairs continued till September 24, 1890, when Torrance & Co. wrote to persuade Swift & Co. to hasten matters. Swift & Co. replied September 25th that they did not feel like assuming the responsibility of shipments in warm weather by either process as at present working. There

they continue merely a negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not; but as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the final agreement have not the power to vary the terms already settled, I think the contract is completed." In the same opinion Lord Blackburn further said: "Parties do often enter into negotiation, meaning that when they have (or think they have) come to one mind, the results shall be put into formal shape, and then (if on seeing the result in that shape, they find they are agreed) signed and made binding; but that each party is <sup>257</sup> to reserve to himself the right to retire if, on looking at the formal contract, he finds that, though it may represent what he said, it does not represent what he meant to say. Whenever on the true construction of the evidence this appears to be the intention I think the parties ought not to be held bound till they have executed the formal agreement." In *Ridgway v. Wharton*, 6 H. L. Cas. 238, Lord Chancellor Cranworth said: "If parties have entered into an agreement they are not the less bound by that agreement because they say, we sent it to a solicitor to have it reduced into form; but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form affords, to my mind generally, cogent evidence that they do not intend to bind themselves till it is reduced into form." Lord Wensleydale said: "These cases often occur in courts of law, and the question then always is whether the parties mean to embody the contract made by parol in writing. If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement nothing will bind them but that written agreement, and that quite independently of the statute of frauds applying to all agreements." . . . . "If the parties agree finally to be bound by any terms, and then for the sake of preserving a memorial, having agreed to the original terms, they get a document drawn up, there is no doubt they are bound by the original terms." In *Morrill v. Tehama M. & M. Co.*, 10 Nev. 135, the court declared the general rule to be, that where the parties enter into any general agreement, and the understanding is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is to be acted on or to take effect, it is not binding until it is so

written or signed. In *Methudy v. Ross*, 10 Mo. App. 106, the court said: "The mere fact that a written contract was to be subsequently prepared does not show that a final agreement between the parties was not made, but it tends to show it; and in this case we think it clear that there was to be a more explicit agreement which was to be reduced to writing; that this was not done, and that <sup>258</sup> there was no meeting of minds." In *Eads v. Carondelet*, 42 Mo. 113, the plaintiff made to the city of Carondelet a written proposition, containing the terms on which he would build gunboats in that city. The city council passed an ordinance reciting the proposition, and expressly accepting it as made; but in the second section of the ordinance directed and empowered the mayor to enter into a written contract with the plaintiff, and employ counsel to draft the contract. The plaintiff carried out his proposition, but the city failed to perform any part. Held, that the city was not bound, as further formality was contemplated. In *Water Commissioners v. Brown*, 32 N. J. L. 504, Brown made a proposition to the commissioners to do certain work in laying a pipe. The commissioners accepted the proposition and directed a written contract to be prepared. This was done, but it was not signed. Held, that the commissioners were not bound. In this case, however, the law provided that the contracts of the water commissioners should be in writing. This fact showed conclusively that a written contract must have been contemplated. In *Congdon v. Darcy*, 46 Vt. 478, the negotiation was for building a dwelling-house by the plaintiff for the defendant. Every thing was agreed upon, and it was also agreed that the contract should be put in writing if the defendant desired. The defendant afterward expressed such desire, and a writing was prepared, embodying the agreement, but the defendant refused to sign it. Held, there was no completed contract.

From these expressions of courts and jurists it is quite clear that after all the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the

signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, <sup>259</sup> or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

In determining which view is entertained in any particular case several circumstances may be helpful, as: whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

Still, with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful, and sometimes unsatisfactory. An illustration of this is the case of *Rossiter v. Miller*, 5 Ch. Div. 648; 3 App. Cas. 1124, above quoted from. In that case Lord Chief Justice Coleridge and Lord Justices James and Baggallay, three of England's most distinguished judges, were clear that there was no contract for want of a formal draft. Lord Chancellor Cairns and Lords Hatherly, Blackburn, and Gordon, equally able and eminent jurists, were confident in the contrary opinion.

We come now to the consideration of the circumstances and correspondence in this case.

The attempt was to negotiate a contract for the use of space on ocean steamers, of which the shippers were to have control to some extent, and in which they were to set up their appliances, and load and care for their own merchandise. This arrangement is quite different from the ordinary contract of affreightment. It is like a charter party which is almost universally reduced to formal written draft.

The negotiations contemplated not simply a contract for one area of space on a single steamer for a single trip. The contract was to be for a year, and for different areas of space on three different ships. The interests of the contracting parties in those <sup>260</sup> spaces were so various and, if not conflicting,

yet in such close contact, that a contract would need to contain many stipulations in order to sufficiently define the rights and duties of the parties. The draft prepared by the steamship company would, if printed in this type, occupy over three pages of this volume. It contained some twenty-one distinct stipulations, many of them nowhere alluded to in the correspondence or conversations, and yet seemingly essential to be agreed upon in a contract for chartering space on ocean steamers for the transportation of dressed meats. It had annexed, as a part of itself, a long printed blank bill of lading. The elder Torrance testified that all the details in the written draft were the well-understood custom of the trade, and understood in every similar contract. He also testified that "the contract was carefully drawn up," and that when he drew it he had before him several other contracts. So far as the case shows, the draft was entirely in manuscript. No printed blanks seem to have been in existence, as there probably would have been had the numerous details become crystallized into a well-understood custom. The defendants deny the existence of any such custom or understanding.

The claim of the plaintiff company that it would have made nearly twenty-five thousand dollars profits by such a contract shows that the negotiations were not about a trifle.

The correspondence seems to indicate that a formal draft of the contract was in the minds of the parties, or at least in the mind of the defendants, as the only authoritative evidence of a contract. In the first letter, that of November 19th, Torrance & Co., the plaintiff's agents, write that they are authorized, "To make a contract for dressed beef on our steamers, *Sarnia* and *Oregon*, and we hasten to advise you that we are prepared to discuss the matter with you." In the second letter they invite a bid. In the letter of March 3, 1890, they name terms and then say, "If you are inclined to do any thing on these terms you might further communicate with us or our Portland house." In the letter of March 24th, from Portland, they say, "We would not be prepared to enter into a contract with you for the *Vancouver*, *Sarnia*, and *Oregon* unless for one year, from Montreal <sup>261</sup> during the summer and Portland in winter, we reserving the right to withdraw *Vancouver* during the winter." In the letter of April 1st they say, "You can arrange with our Portland house in reference to the contract." July 8th the defendants wired for a copy of the contract to be sent. On the same day Torrance & Co. write,

apologizing for neglect to send copy. July 10th Torrance & Co. send the written draft which has been above described, and write, "We now inclose you copy of our proposed contract, which we trust may be found in accordance with the understanding arrived at last March."

Neither party, during all the correspondence, seems to have made any change in his business operations by reason of any thing in the correspondence. No dressed meats were shipped by the defendants or offered for shipment. No space was reserved by the plaintiff, and there was no delay or hindrance suffered in its regular business.

The case is by no means free from doubt and difficulty, but due reflection and study of the evidence have at the last brought us to the conclusion that what the plaintiff claims to have become a perfected contract on April 5, 1890, by the defendants' letter of that date, was at the most only the acceptance of the proposed basis of a contract, which was yet to be perfected as to details and put in writing; and that the defendants did not have nor signify any intention to be bound until the written draft had been made and signed.

Judgment for defendants.

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**CONTRACTS—NECESSITY FOR SIGNING.**—Where the parties make the reduction of a contract to writing and its signature by them a condition precedent to its completion it will not be a contract until this is done, though its terms have been agreed upon: *Green v. Cole*, 103 Mo. 70; *Hodges v. Sublett*, 91 Ala. 588. A written contract acquires no force as such until it is signed and delivered: *Hoen v. Simmons*, 1 Cal. 119; 52 Am. Dec. 291. A person making a proposal, or accepting one, may attach a condition that the contract be reduced to writing and signed by both parties, but the proposal or acceptance must be expressed so as to show that such a condition was intended: *Allen v. Chouteau*, 102 Mo. 369.

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## TOLMAN v. WARD.

[86 MAINE, 303.]

**MARRIAGE AS CONSIDERATION FOR DEED.**—Promise of marriage is a valuable consideration for a deed, and if the marriage afterwards takes place the deed is valid so far as the consideration is concerned. Any fraud intended by the grantor upon his creditors does not avoid the deed if the grantee is innocent.

**MARRIAGE MAY BE GIVEN IN EVIDENCE AS THE CONSIDERATION** of a deed expressed to be for a money consideration only.

*H. and W. J. Knowlton*, for the plaintiff.

*E. W. Whitehouse*, for the defendant.

204 WALTON, J. This is a suit in equity. The plaintiff is assignee of Stephen C. C. Ward, an insolvent debtor. The plaintiff avers that February 1, 1889, the insolvent conveyed a parcel of real estate to Cora A. Brown, and that the conveyance was 205 made without consideration, and for the purpose of putting the property beyond the reach of creditors; and he prays that the conveyance may be decreed void, and that the grantee may be ordered to convey her interest in the premises to him as assignee.

There would be no doubt of the power of the court to make the decree prayed for if these allegations were proved. But we do not think that either of them is proved. The proof is that the conveyance in question was made in consideration of a contemplated marriage between the grantee and the grantor; and marriage has always been held to be one of the highest and one of the most valuable considerations known to the law.

In *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758, the court held that a promise of marriage, made in good faith by a woman, to one who had conveyed to her a parcel of real estate for the purpose of persuading her to marry him, was a sufficient consideration to sustain the conveyance against the grantor's creditors, although the death of the grantor prevented the marriage from being consummated.

And in *Gibson v. Bennett*, 79 Me. 302, where a creditor had levied upon land as the property of the husband, and it was proved that the land had been conveyed to the wife by the husband before their marriage, and in consideration of her promise to marry him, the court held that the levy could not be sustained. "It is clear," said Mr. Justice Emery, "that, upon such a state of facts, no creditor of the husband can take the land by a subsequent attachment and levy. Marriage is a valuable consideration for a deed, and, if the marriage afterward take place, the deed is valid so far as the consideration is concerned. Any fraud intended by the grantor upon his creditors would not avoid the deed if the grantee was innocent."

And in *Prewitt v. Wilson*, 103 U. S. 22, the court held that an antenuptial settlement of lands, though made by the intended husband with the design of defrauding his creditors, will not be set aside except upon the clearest proof that the intended wife participated in the fraud. There is no such proof in the present case.



But the point is made by the learned counsel for the plaintiff that marriage cannot be given in evidence as the consideration of a deed expressed to be for a money consideration only; and, in support of the proposition, they cite *Betts v. Union Bank*, 1 Harr. & G. 175; 18 Am. Dec. 283.

The court did so hold in that case. But the decision does not rest on the consideration of marriage alone. It applies to all considerations in conflict with the one expressed in the deed. And there are other decisions in which the doctrine is maintained that the expressed consideration in a deed cannot be varied or contradicted by oral evidence. But in this state, and in most of the states, the law is otherwise.

In *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572, this court held that the only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor; and that for every other purpose the consideration may be varied or explained by parol proof; and in the opinion of the court, by Mr. Justice Appleton, a great many authorities are cited showing how extensively the doctrine has been adopted, and the great variety of cases in which it has been applied; and at the present day we apprehend that there are but few, if any, courts that hold to a different doctrine: See note to *McCrea v. Purmort*, 16 Wend. 460; 30 Am. Dec. 103, and the authorities there cited.

Our conclusion is that the present suit must fail for want of proof. The proof fails to show that the conveyance to the defendant was made without consideration, or that the grantee knew of or participated in any fraudulent purpose of her then intended husband to place the property beyond the reach of his creditors. In fact, the evidence is very weak of the existence of such a purpose on his part.

Bill dismissed, with costs.

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DEEDS—CONSIDERATION—MARRIAGE.—A contract of marriage is a valuable consideration for a deed, and it need not be in writing: *Prignon v. Dausent*, 4 Wash. 199; 31 Am. St. Rep. 914, and note. See, also, the extended note to *Verplank v. Sterry*, 7 Am. Dec. 262.

## MITCHELL v. ABBOTT.

[86 MAINE, 333.]

**REWARDS—ACCEPTANCE—REVOCATION—PRESUMPTION.**—An offer of reward for the detection of an offender or the recovery of property is a proposal merely. If acted upon before revocation the offer and acceptance by a performance become a valid contract for a sufficient consideration. It may be revoked at any time before acceptance, and though unlimited as to time and never withdrawn, it must be accepted by performance within a reasonable time, or it is conclusively presumed to have been revoked.

**REWARDS—REVOCATION—PRESUMPTION.**—A lapse of more than twelve years between the time that a reward is offered for the detection of an offender and the time of performance is more than a reasonable time, and raises a presumption that such offer has been revoked.

*Walton and Walton*, for the plaintiff.

*Crosby and Crosby*, for the defendants.

**340** **WISWELL, J.** The plaintiff alleges that on the twenty-third day of February, 1878, the defendants published an offer of a reward; that upon the thirty-first day of March, 1890, the plaintiff performed the service which entitled him to the reward in accordance with the terms of the offer.

Various objections to the maintenance of the suit are suggested and argued by the defendants' counsel. It is only necessary to consider one, which, we think, is an insuperable objection to the maintenance of the action, unless there are facts other than those set out in the plaintiff's declaration, viz., that the offer of reward was a proposal to continue for a reasonable time only, and that it ceased to be a proposal long before the time when the plaintiff alleges he accepted it by a performance of the service, for which the reward was to be paid.

The legal principles applicable to an offer of reward for the detection of an offender or the recovery of property are well understood. Such an offer is a proposal merely; if acted upon before revocation the offer and acceptance by a performance become a valid contract for a sufficient consideration. It may be revoked at any time before it is acted upon.

The offer in this case was unlimited as to time, and, so far as we know, was never withdrawn by the act of those making it. We think that the proper construction of such a proposal is, as contended by the defendants, that it must be accepted by performance within a reasonable time, and that the law will, in the absence of other facts, conclusively presume a revocation after **341** a reasonable time. Otherwise it would

be a perpetually continuing offer for all time. The statute of limitations would furnish no relief nor limit the continuance of the offer, provided only that the action be commenced within the statutory period after performance. Such a construction would be most unreasonable, and one that could neither have been intended by the persons making the offer, nor contemplated by one who twelve years later was instrumental in bringing about the detection of the offender.

Our view is fully sustained by the Massachusetts court in the case of *Loring v. Boston*, 7 Met. 409. In that case a lapse of three years and eight months was held to be beyond a reasonable time.

In this case it is not necessary to decide what would be a reasonable time during which the offer would continue. A lapse of more than twelve years between the time of making the offer and the time of performance is certainly much more than a reasonable time. We are forced to presume, therefore, a withdrawal or revocation of the offer before the time of acceptance.

The defendants filed a demurrer; the case was then reported to the law court for the determination of certain questions. Counsel upon both sides expressed a desire that the question considered, although not specially raised in the report, should be decided. This question is raised by the general demurrer, and we have considered it alone, because, unless the plaintiff can show other facts and circumstances than those alleged, it finally determines the rights of the plaintiff in this or any other action brought to recover this reward.

The plaintiff will have the right to amend the declaration *at nisi prius*, upon terms, if there are any other facts which can avail him.

Declaration adjudged defective. Demurrer sustained.

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**REWARDS—POWER TO REVOKE OFFER OF.**—An offer of a reward for the apprehension of one charged with a crime is nothing more than a proposition or offer to the public, and until some one complies with the terms and conditions thereof, may be withdrawn: *Biggers v. Owen*, 79 Ga. 658; *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634.

**REWARDS—OFFER OF WHEN BINDING.**—An offer of reward for the arrest of a criminal when acted upon is binding upon the party making it: *Kasling v. Morris*, 71 Tex. 584; 10 Am. St. Rep. 797, and note; *Central R. R. etc. Co. v. Cheatham*, 85 Ala. 292; 7 Am. St. Rep. 48, and note. An offer of a reward on one side, and the acceptance and performance on the other, constitute a valid contract made on good consideration, which the law will enforce: *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634, and extended note. See, further, the extended note to *Hayden v. Souger*, 26 Am. Rep. 7.

## EATON v. McCALL.

[36 MAINE, 346.]

**MORTGAGES—FORECLOSURE—JURISDICTION OVER LAND IN ANOTHER STATE.**

A court of chancery having jurisdiction of the parties has power to make a decree compelling a mortgagor to convey the mortgaged premises, situate in another state, to the mortgagee, after his failure to pay the amount ascertained to be due upon foreclosure within the time fixed by the decree. But the court should not exercise this power except under unusual and extraordinary circumstances, and when it is necessary in order to prevent loss or to protect the rights of the mortgagee; in all other cases he should be required to resort to the remedies of the courts of the jurisdiction in which the land is situated.

*H. D. Eaton*, for the plaintiff.

<sup>347</sup> **WISWELL, J.** Bill in equity between parties resident in this state to foreclose a mortgage upon real estate situated in Nova Scotia.

The defendant failing to appear, the bill was taken *pro confesso*. Afterwards, on motion for a decree, the justice presiding at *nisi prius*, being doubtful as to the jurisdiction of this court, with the consent of counsel for the complainant, reported the case to the law court to determine whether the bill should be sustained, and what decree, if any, should be made.

It is a familiar maxim of equity jurisprudence, that equity acts against the person. Where the subject matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affects and operates upon the person of the defendant, and not upon the subject matter, although the subject matter is <sup>348</sup> referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately, but indirectly, affected by the relief granted: *Pomeroy's Equity Jurisprudence*, sec. 1318.

Common instances of such an exercise of equity powers are where courts, having jurisdiction of the person, decree the specific performance of contracts to convey lands, enforce and regulate trusts, or relieve from fraud, actual or constructive, although the subject matter of the contract, trust, or fraud, either real or personal property, be situated in another state or country. A leading case upon this subject, and one often cited in modern cases, is that of *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, decided in 1750 by Lord Chancellor Hardwicke.

The fact of the *situs* of the land being without the common-

wealth does not exempt defendant from jurisdiction, the subject of the suit being the contract, and a court of equity dealing with persons, and compelling them to execute its decrees and transfer property within their control, whatever may be the *situs*: *Pingree v. Coffin*, 12 Gray, 288.

The principle is thus stated by the federal supreme court: "Where the necessary parties are before a court of equity it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject matter such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by a process *in personam*: *Phelps v. McDonald*, 99 U. S. 298.

Our court in *Reed v. Reed*, 75 Me. 264, sustained a bill and made the necessary decrees to redeem from a mortgage lands situated in the state of Wisconsin. And the court has in many cases proceeded and granted relief upon the maxim, *Equitas agit in personam*.

The English chancery courts, regarding the right to redeem <sup>849</sup> as a mere personal right, and the decree for a foreclosure a decree *in personam*, have often decreed the foreclosure of mortgages upon lands beyond the jurisdiction of the court: *Toller v. Carteret*, 2 Vern. 495; *Paget v. Ede*, L. R. 18 Eq. 118.

In this country the question has frequently arisen as to the power of an equity court to decree the foreclosure of a mortgage upon property situated both within and without the jurisdiction of the court. The doctrine is sustained by the highest authorities that a court having jurisdiction of the person of the mortgagor, or of the owner of the right to redeem, may decree such a foreclosure.

In *Muller v. Dows*, 94 U. S. 444, it was held that a United States circuit court for the district of Iowa, which had jurisdiction of the mortgagor and the trustees of the mortgage, could make a decree foreclosing a mortgage upon a railroad and its franchises, and order a sale of the entire property, although a portion of the property was in the state of Missouri. Mr. Justice Strong, in delivering the opinion of the court, said: "Without reference to the English chancery decisions, where this objection to the decree would be quite unten-

able, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a state and having jurisdiction of the person may decree a conveyance by him of land in another state, and it may enforce the decree by a process against the defendant.

In *Union Trust Co. v. Olmsted*, 102 N. Y. 729, the plaintiff sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation upon property, a part of which was situated in another state. The court held that although the decree of foreclosure might not be operative beyond the territorial limits of the jurisdiction, that the court might have required the mortgagor, being within the jurisdiction, to execute a conveyance of the property situated in the other state.

To the same effect are numerous other decisions by courts of the highest authority in this country, both federal and state. After an examination of these authorities we have no doubt that <sup>250</sup> this court has the power to make a decree compelling a mortgagor, over whom it has jurisdiction, to make a conveyance of the mortgaged premises, after failure to pay the amount ascertained to be due, within the time fixed by a decree of the court, which time should not be less than the statutory period allowed for redemption in the place where the land is situated.

But as to when and under what circumstances this power should be exercised by the court is, we think, another and quite different question. It must be remembered that no decree of the court would be operative except one against the mortgagor, or person having the right to redeem, commanding a conveyance. The court could not proceed in the usual and customary method by decreeing either a strict foreclosure, or a foreclosure by a judicial sale. Neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court: *Watkins v. Holman*, 16 Pet. 25. A court cannot send its process into another state, nor can it deliver possession of land in another jurisdiction: *Muller v. Dows*, 94 U. S. 444. It can only accomplish foreclosure of such a mortgage by its decree *in personam*, compelling a conveyance.

We do not think that a chancery court should exercise this power except under unusual or extraordinary circumstances.

Wherever it is necessary in order to prevent loss or to protect the rights of a mortgagee it may be done; for instance, in the case of a mortgage upon property situated both within and without the state, where, unless a sale of the entire property could be made at one time, great loss might ensue, or in other cases where an equally good reason existed. But ordinarily we think that the holder of a mortgage should be required to resort to the remedies or the courts of the jurisdiction in which the land is situated. This is in accordance with the principle, than which none is better established, that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the same is situated: *Watkins v. Holman*, 16 Pet. 25.

In this case there are no reasons, either alleged or apparent, <sup>251</sup> why the holder of this mortgage cannot foreclose the same according to the law of the place where the land is situated, without loss or great inconvenience.

We think, therefore, that the entry should be, bill dismissed without prejudice. —

**JURISDICTION OF EQUITY OVER LAND AND PROPERTY IN A FOREIGN JURISDICTION.**—This question is fully treated in the monographic notes to *Newton v. Bronson*, 67 Am. Dec. 95; *Alley v. Caspari*, 6 Am. St. Rep. 182; *Molynex v. Seymour*, 76 Am. Dec. 666, and *Sentenis v. Ladew*, 37 Am. St. Rep. 72. See, also, *Hayden v. Yale*, 45 La. Ann. 362; 40 Am. St. Rep. 232, and note.

## STATE v. PERLEY.

[86 MAINE, 427.]

**ROBBERY—SUFFICIENCY OF INDICTMENT—ALLEGATION OF VALUE.**—An indictment for robbery, describing the property taken as “certain money and one silver watch and watch-chain, of the goods and chattels” of a person named, is sufficient without further allegation of value.

**ROBBERY—INDICTMENT—ALLEGATION OF VALUE.**—An indictment for robbery is sufficient without averment of the value of the property taken. The putting in fear and taking the property constitute the gist of the crime, and are the only essential elements that need be alleged.

**LARCENY—INDICTMENT—ALLEGATION OF VALUE.**—Indictments for larceny must state the value of the property alleged to have been stolen only when the punishment is graduated with reference to its value.

**ROBBERY—INDICTMENT—ALLEGATION OF VALUE—CONVICTION OF MINOR OFFENSE.**—In an indictment for robbery no allegation of the value of the property taken is necessary to justify a conviction for larceny or a minor offense, upon failure to prove the aggravation for the robbery.



*J. Hutchings and P. H. Gillin, for the defendants.*

*C. A. Bailey, county attorney, for the state.*

<sup>430</sup> WHITEHOUSE, J. The defendants were found guilty of the crime of robbery on an indictment under chapter 250 of the statute of 1889, entitled "An act to define robbery and its punishment," which reads as follows: "Whoever by force and violence, or by putting in fear, feloniously steals and takes from the person of another property that is the subject of larceny is guilty of robbery, and shall be punished by imprisonment for life or for any term of years." This act of 1889, however, did not modify the definition of robbery as found in the Revised Statutes, chapter 118, section 16, but only changed and simplified the provisions of that section respecting the punishment.

It is charged in the indictment that the respondents "feloniously an assault did make, and him, the said John H. Emerson, did then feloniously put in fear, and with force and violence did then feloniously steal, take, and carry away from the person of him, the said John H. Emerson, certain money of the said John H. Emerson, and one silver watch and one watch-chain of the goods and chattels of the said John H. Emerson."

After the verdict the defendants filed a motion in arrest of judgment based on four specifications; but the only ground now relied upon is that the indictment contains no allegation that <sup>431</sup> the money or the watch and chain therein mentioned had any value.

It is a principle of natural justice which was early recognized as a fundamental rule of the common law, now incorporated into our constitution as a guaranty of protection to individual rights, that in all criminal prosecutions the accused is entitled to "demand the nature and cause of the accusation" against him. No person can be held to answer to a criminal charge until it is "fully, plainly, substantially, and formally described to him." Every material fact which serves to constitute the offense must be expressed with reasonable fullness, directness, and precision. The purpose of this rule is sufficiently obvious. It is to inform the accused of the exact charge against him, and enable the court to determine whether the facts alleged constitute a crime, and on proof of them to render such appropriate judgment as will be a bar to any future prosecution for the same offense: 8 Starkie's

Evidence, 1527; *Commonwealth v. Pray*, 13 Pick. 359. "The doctrine of the court," says Mr. Bishop, "is identical with that of reason, viz; that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted": 1 Bishop's Criminal Practice, sec. 81. It is plain, however, that much of the useless tautology and wearisome prolixity which characterized indictments in the early period of criminal procedure can be safely avoided without any infringement of this sacred right of the citizen. It is the policy of our modern courts to encourage a more rational system of pleading, with greater directness and simplicity of statement, with less verbiage and needless repetition, and with greater regard for the construction and idioms of the English, than for those of the Latin language. In reason, an indictment is best, says Mr. Bishop, when it is "in the fewest and aptest words with no superfluous matter," and while, under ordinary circumstances, it would not be judicious to omit any thing concerning the necessity of which a question may be raised to embarrass the trial, on the other hand no allegation and ordinarily no word should be introduced which is certainly needless: Bishop's Directions and Forms, secs. 10, 35.

In the case at bar, if the value of the property named in the <sup>432</sup> indictment is not a necessary ingredient of the offense sought to be charged, and is not "legally essential to the punishment to be inflicted," an allegation of it is "certainly useless," and properly omitted. The precise point has never before been raised in this state, and the court is now at liberty to determine it in accordance with the plain philosophy of the question and the true science of pleading.

The indictment charges the offense in the language of the statute as far as permissible under the rule requiring a specification of the property and other identifying particulars. It does not state generally that the defendants took "property that is the subject of larceny," but specifically that they took "certain money and one silver watch and watch-chain," which are declared by the Revised Statutes, chapter 100, section 1, to be subjects of larceny. It must be observed that there is no provision of this statute which makes the amount of property taken an essential element of the offense; and there is no statute in this state which creates degrees in robbery, or in any way makes the punishment of the offense dependent upon the value of the property taken.

Nor is there any thing in the nature of robbery, as defined by the common law, from which it appears that the value of the property has ever been deemed of the essence of the crime. Blackstone defines it to be "the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear" (4 Blackstone's Commentaries, 242); and all the authorities agree that the taking may be of money or goods "of any value." The value of the property is therefore quite immaterial. "A penny as well as a pound forcibly extorted makes a robbery, the gist of the offense being the force and terror": 2 Archbold's Criminal Practice and Pleading, 1287; 3 Coke's Institutes, 69; 1 Hale's Pleas of the Crown, 532; 1 Hawkin's Pleas of the Crown, 212.

True, robbery is characterized by the common law as compound or aggravated larceny. It is "larceny committed by violence from the person of one put in fear": 2 Bishop's Criminal Law, sec. 1156. And it is the well-settled general doctrine that indictments for larceny must allege the value of the article alleged to have been stolen. It is conceded, however, that this rule had its origin in <sup>433</sup> the practice of distinguishing between grand and petit larceny with reference to the extent of the punishment, that being dependent in some measure upon the value of the article stolen; and it is still maintained, because, under our statutes, the punishment for larceny is also graduated with reference to the value of the property stolen: 2 Archbold's Pleading and Practice, 1149, and note; *Hope v. Commonwealth*, 9 Met. 134; 2 Bishop's Criminal Practice, sec. 713; Rev. Stats., c. 120, sec. 1. But where the value is not essential to the punishment it need not be distinctly alleged or proved. The jury must be satisfied, however, that the goods were of some value, and they may infer it without separate proof, either from the inspection of the articles, or from the description of them by the witnesses: 2 Bishop's Criminal Practice, sec. 751; *Commonwealth v. Burke*, 12 Allen, 182; *Commonwealth v. Lawless*, 103 Mass. 425; *State v. Gerrish*, 78 Me. 20. Upon this point Mr. Archbold says: "Since the distinction between grand and petty larceny was abolished it seems to have been no longer necessary to insert the value of the article stolen in indictments, except for stealing to the value of five pounds in a dwelling-house. It was said, indeed, by some to be necessary to show that the thing was of some value, but this was sufficiently shown by stating it to be of the goods and chattels of the

prosecutor. As it can be of no use, therefore, in any case to insert it where the value or price is not of the essence of the offense, and as the statutes 14 and 15 Victoria (c. 100, sec. 24) sanctions its omission in all other cases, I have in practice omitted to insert it except in the simple case above mentioned": 2 Archbold's Pleading and Practice, 1153.

It is still urged, however, that, upon the theory that robbery is an aggravated larceny, an indictment for robbery should contain the allegation of value to authorize a conviction of larceny, in the event of a failure to prove the aggravation. But this suggestion is sufficiently answered by the statute creating a distinct offense of larceny from the person, the punishment of which does not depend upon the value of the property stolen (Rev. Stats. c. 120, sec. 4). In *Commonwealth v. McDonald*, 5 Cush. 365, the court says, respecting this offense: "As the punishment for stealing from the person does not depend on the amount stolen <sup>424</sup> there was no occasion for any allegation of value." This is cited with approval in the note to 2 Archbold's Pleading and Practice, 1150. And in *Commonwealth v. Burke*, 12 Allen, 182, the precise point was directly raised and determined in accordance with the dictum in *Commonwealth v. McDonald*, 5 Cush. 365. It is clear, therefore, that in an indictment for robbery no allegation of value can be necessary to justify a conviction of the minor offense upon failure to prove the aggravation.

Many other authorities may be cited in support of the proposition, so strongly sustained by reason, that an indictment for robbery is sufficient without an averment of the value of the property taken. In *State v. Howerton*, 58 Mo. 581, the court says respecting this crime: "The value of the thing taken is not of the essence of the offense. The putting in fear and taking the property constitute the gist of the crime, and there is no necessity for either charging in the indictment or proving at the trial, or specifying in the verdict, the value of the property." In *State v. Burke*, 73 N. C. 83, it is said to be unnecessary to allege the value of the property, "since force or fear is the main element of the crime": See, also, Wharton's Criminal Law, 9th ed., sec. 857; *State v. McCune*, 5 R. I. 60, and note, 70 Am. Dec. 180; *James v. State*, 53 Ala. 38; *Williams v. State*, 10 Tex. App. 8.

The reasoning of the court in *Commonwealth v. Cahill*, 12 Allen, 540, is not in harmony with *Commonwealth v. Mc-*

*Donald*, 5 Cush. 365, and *Commonwealth v. Burke*, 12 Allen, 182, from the same state, and cannot be adopted by this court.

The other objections raised by the defendants' exceptions are not insisted upon, and are obviously without merit.

Exceptions overruled.

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**ROBBERY—INDICTMENT—ALLEGATION OF VALUE.**—An indictment for robbery which does not allege the value of the property taken, or that it was of any value, and which merely describes it as "twenty-five dollars in money, the said money then and there being the property of the said John Bond," is fatally defective: *State v. Segermond*, 40 Kan. 107; 10 Am. St. Rep. 169. An indictment for the robbery of bank bills alleging their value, but not their denomination, is bad: *Arnold v. State*, 52 Ind. 281; 21 Am. Rep. 175. Under an indictment charging the taking of ten dollars in money it is not necessary to prove its value, as money is the measure of values: *McCarty v. State*, 127 Ind. 223. See, also, the extended note to *State v. McCane*, 70 Am. Dec. 180.

**LARCENY—INDICTMENT.—ALLEGATION OF VALUE:** See the notes to *State v. Segermond*, 10 Am. St. Rep. 174; *McCarty v. State*, 22 Am. St. Rep. 155, and *Lord v. State*, 51 Am. Dec. 233. An indictment which charges the larceny of several articles need not allege the value of each article charged to have been stolen: *State v. Brew*, 4 Wash. 95; 31 Am. St. Rep. 904, and note. Proof of the alleged value, to sustain an indictment for stolen goods, is unnecessary. It is sufficient for conviction that the property alleged to be stolen is shown to be of some value, as things of no value are not subjects of larceny: *Commonwealth v. Riggs*, 14 Gray, 376; 77 Am. Dec. 333, and note.

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## STATE v. HAMLIN.

[88 MAINE, 495.]

**COLLATERAL INHERITANCES—TAXATION OF—CONSTITUTIONAL LAW.**—A statute imposing an excise tax on collateral inheritances is not a tax on real or personal property within the meaning of constitutional provisions protecting the right to acquire and possess property, and providing that private property shall not be taken for public use without compensation, that all taxation shall be equal and uniform, and that no one shall be deprived of his property without due process of law.

**COLLATERAL INHERITANCES—TAXATION OF—CONSTITUTIONAL LAW.**—In the absence of constitutional prohibition the legislature may by statute dispose of an intestate decedent's estate, after payment of his debts, to any class of his kindred to the exclusion of any other class, and, if it permits collateral kindred to inherit it, may exact an excise tax or duty from such kindred for that privilege, so long as such excise is uniform as to the entire class of collateral, or it may require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent.

**COLLATERAL INHERITANCES—TAXATION OF—CONSTRUCTION OF STATUTE.**—A statute imposing an excise tax on all collateral inheritances “above the sum of five hundred dollars,” exempts that sum from each and every collateral inheritance, and is not an exemption from the corpus of the estate alone.

*C. A. Bailey, county attorney, for the state, appellant.*

*C. J. Dunn, F. A. Wilson, and A. W. Paine, for the appellees.*

<sup>497</sup> **STROUT, J.** This appeal from the decree of the judge of probate arises under chapter 146, section 1, of the statute of 1893. That section is as follows:

“SECTION 1. All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of the daughter of a decedent, shall be liable to a tax of two and a half per cent of its value, above <sup>498</sup> the sum of five hundred dollars, for the use of the state, and all administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor’s life shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed.”

It is strenuously claimed by the appellee that the act is in violation of the constitutional provisions, that all men “have certain natural, inherent, and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property”: Const., art. 1, sec. 1.

“Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it”: Const., art. 1, sec. 21.

“All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof”: Const., art. 9, sec. 8. Also of the fourteenth amendment to the constitution of the United States.

Succession duties or taxes have been in existence in other countries for centuries, and have been regarded with favor, as

a convenient and comparatively nonburdensome means of revenue. They were well known in Roman jurisprudence (1 Gibbon's Rome, 133), and were imposed upon all successions, except those to the nearest relatives and to the poor. The practice has long been resorted to in European countries, and was introduced in England in the last century, and was enlarged from time to time till 1853, when it was extended to all successions to real property, chattels real, and a vast variety of personal property and rights.

In this country they were imposed by Congress, by acts of June 30, 1864, and July 13, 1866, which were repealed in 1870. They were held by the supreme court of the United States to impose an excise tax or duty, and, as such, not in violation of the constitution of the United States: *Scholey v. Rew*, 23 Wall. 331.

The policy of taxing collateral inheritances was adopted in Pennsylvania in 1826, and has been adhered to ever since. In <sup>499</sup> that state the statute has been constantly recognized as valid by its supreme court: *Strode v. Commonwealth*, 52 Pa. St. 181; *Orcutt's Appeal*, 97 Pa. St. 179; *Bittinger's Estate*, 129 Pa. St. 338.

In Maryland, Virginia, Delaware, New York, and several other states, laws imposing succession taxes have been enacted, and are now in force, that of Virginia dating back to 1844, of Delaware to 1869, Maryland to 1864; the others of more recent date. In Maryland the act was attacked as in violation of the declaration of rights, in the constitution of 1864, which declared "that the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government, but every other person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property; yet fines, duties, or taxes may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community." But the court of appeals held the statute to be constitutional. Robinson, J., in delivering the opinion of the court, said: "We have not the slightest doubt as to the constitutionality of the law. . . . The restrictions imposed by it [the constitution] upon the legislative power, as to the objects of taxation, are explicitly declared. Poll taxes are denounced as grievous and oppressive, paupers are exempted from assess-



ment, and all other persons are required to pay their proportion of public taxes, according to the value of their property. Arbitrary taxes on property without regard to value are expressly prohibited, and all measures for the collection and imposition of taxes upon property are required to conform to this general principle of equality. Whilst thus providing for a uniform mode of taxation on property it was not the purpose of the framers of the constitution to prohibit any other species of taxation, but to leave the legislature the power to impose such other taxes as the necessities of the government might require": *Tyson v. State*, 28 Md. 586; *State v. Dalrymple*, 70 Md. 294.

500 In Virginia the supreme court held the same doctrine in *Eyre v. Jacob*, 14 Gratt. 430; 73 Am. Dec. 367. In that case the court said: "The right to take property by devise or descent is the creature of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent, to a particular class of his kindred, say to his lineal descendants and ascendants, and it might impose terms and conditions upon which collateral relatives may be permitted to take it; or it may to-morrow, if it please, absolutely repeal the statute of wills and that of descents and distributions, and declare that, upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses."

The statute of New York, chapter 483 of the laws of 1885, contains substantially the same provisions, and nearly the same exemptions, as the first section of chapter 146 of the laws of 1893 of our state. It does not differ in principle from ours. The question of the constitutionality of this act came before the New York court of appeals, in *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, and that court said: "We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select objects of taxation. It may impose all the taxes upon land, or all upon personal property, or all upon houses or upon incomes." A like statute in New Hampshire was held by the supreme court of that state to be in violation of that state's constitution, which empowered the legislature to assess and lay taxes, but expressly limited that grant of

power to "proportional and reasonable assessments, rates, and taxes upon all the inhabitants and residents within the said state, and upon the estates within the same." And by section 12 of the bill of rights, that every member of the community "is bound to contribute his share to the expense" of the state: *Curry v. Spencer*, 61 N. H. 624; 60 Am. Rep. 337.

We are not aware that the question has been decided in any other state where similar statutes exist. These decisions of ~~the~~ the courts, being based upon constitutions containing provisions, in some cases unlike, and in others like, but not the same, as our constitution, have a lessened weight as authority here. In Virginia the constitution required taxes to be equal and uniform. In Maryland the constitutional provision required every person holding property to contribute his proportion of public taxes, according to his actual worth in real or personal property. But whatever may be the particular language of the several state constitutions all the cases assume that the constitution, either in terms or by necessary implication, requires taxation of property to be equal and uniform, and in all of them, except the New Hampshire case, succession taxes are regarded as special taxes or duties, or, more exactly, excises, not falling within the regular and ordinary annual taxation of property, contemplated and provided for and guarded by constitutional provisions and limitations.

The statute under consideration provides a subject and mode of taxation not heretofore resorted to in this state. The act provides sufficient opportunity to parties interested to be heard, and have their rights protected, and cannot be deemed to conflict with article 1, section 6, of the constitution, which provides that no person shall be deprived of his property or privileges, but by judgment of his peers, or by the law of the land; nor with section 21 of the same article, which prohibits the taking of private property for public uses without just compensation. Perhaps the latter provision is limited to the exercise of the right of eminent domain, and does not extend to the subject of taxation. The word "compensation" seems to imply a money or other valuable consideration, as distinguished from the protection of life and property afforded by the state as a return for the tax contributions of its citizens.

Does the act conflict with the constitutional provision which requires all taxes assessed upon real and personal estate to be apportioned and assessed equally, according to the just value thereof? The first constitution of Maine provided that

“while the public expenses shall be assessed on polls and estate a general valuation shall be taken at least once in ten years”: <sup>502</sup> Art. 9, sec. 7. Section 8, immediately following, was, “All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof.” These provisions remained unchanged until 1875, when, by an amendment, the words “and personal” were inserted after the word “real” in the eighth section. Prior to this amendment there was no express constitutional requirement that taxes on personal property should be uniform; but it was left to the legislature to determine the subjects, mode, and rate of taxation of personal property, in its discretion, and without limitation or restriction, unless such exercise of power should degenerate into such arbitrary, oppressive, and unreasonable exactions, as to be subversive of the principles of the constitution and the rights of the people: Cooley’s Constitutional Limitations, 616, 617.

The two sections, 7 and 8, as they now stand, must be construed together, to determine their scope and extent. Section 7 provides that, so long as the public expenses shall be assessed on polls and estates, to equalize the burden as nearly as practicable, a general valuation shall be taken as often as every ten years. By its terms it necessarily implies a periodical and regularly recurring assessment of predetermined amounts, proportioned to the entire estates within the taxed district, to meet continuing and regularly recurring expenses; while section 8, manifestly referring to the same class of general taxes, provides for an equal apportionment and assessment according to value. It is clear that these sections contemplate only the general, constantly recurring assessment upon the same property, and do not include occasional, exceptional, and special subjects and modes of taxation. The constant practice, hitherto unobjected to, of imposing a duty, or exacting a fee, for the right to exercise certain vocations, not illegal in themselves, but made so by statute for the purpose of deriving a revenue therefrom, such as that required of itinerant vendors, retail liquors dealers, while a license law existed, innholders, auctioneers, insurance brokers, etc., notwithstanding all the real and personal property of such persons, was assessed in common with the property of all others <sup>503</sup> in the state in the general and recurring assessments, conclusively shows that many subjects of taxation have constantly been regarded as not falling within the prohibition of sections 7 and

8 of the constitution. The tax imposed upon the franchises of railroads and other corporations, upon a basis which did not result in equal taxation according to value and proportion, has been held by this court as not in violation of the constitution, but within the legitimate province of the legislature: *State v. Western Union Tel. Co.*, 73 Me. 527; *State v. Maine Central R. R. Co.*, 74 Me. 382. So, also, the extensive exemptions of property from all taxation, such as the property of literary, benevolent, and charitable institutions, acquiesced in for many years, without objection, afford a practical construction of sections 7 and 8, that they do not require an absolute equality; but that the legislature may, in its discretion, exempt from taxation classes of property within the terms of these sections, although the effect is to increase the rate upon other assessable property, and may select classes of subjects from which duties and excises may be required, not, however, degenerating into arbitrary and oppressive burdens. The duties exacted by the state from justices of the peace, and other officers, and attorneys before admission to the bar, have never been regarded as a violation of the constitutional provisions in regard to taxation; but as excise taxes, rightfully levied: *Cooley's Constitutional Limitations*, 617-619; *Portland Bank v. Apthorp*, 12 Mass. 256.

It is evident, therefore, that these constitutional requirements do not include every species of taxation, but all special cases like those referred to are by implication excepted.

The tax provided for in the statute under consideration is clearly an excise tax: *Scholey v. Rew*, 23 Wall. 346. The whole tenor and scope of the act is one of excise, and not a tax upon property, as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon the interests specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. It is true that the act contains some language <sup>504</sup> indicating a tax upon property; but it should be construed according to its essential principle, object, and effect. Substance, and not form or phrase, is the important thing. All exactions of money by the government are taxes; but they are not all levied by assessment upon values. The latter class refers to the burdens recurring periodically, which are assessed upon valuations of property, made at stated intervals. Danforth, J., in delivering the opin-

ion of the court in *State v. Western Union Tel. Co.*, 73 Me. 527, said: "Such is the variety and extent of meaning attached to the word 'tax,' or 'taxes,' that no argument either way can be drawn from its use. It has been at different times applied to nearly if not quite every burden imposed upon persons, property, or business for the support of government, and in acts for raising a revenue for public purposes it seems to be used as meaning the same thing as impost, duty, or excise."

The tax under this statute is once for all an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the state. It is uniform in its rate as to the entire class of collaterals and strangers, which satisfies the constitutional requirement of uniformity: *State v. Western Union Tel. Co.*, 73 Me. 527; *Brewer Brick Co. v. Brewer*, 62 Me. 74; 16 Am. Rep. 395. "It is not levied as property taxes usually are. There is no given sum to be assessed in which the percentage is fixed by valuation, but the percentage is fixed by law, leaving the amount to be ascertained by the valuation." The value of the property is resorted to to measure the amount of the excise. The act taxing telegraph companies in terms imposed a tax of two and one half per cent on the value of any telegraph line, etc., and it was strongly urged by counsel that this was a property tax, and not an excise, and therefore violated the constitutional provision requiring equal taxation; but this court in *State v. Western Union Tel. Co.*, 73 Me. 527, held that the tax was an excise, and clearly within the constitutional right of the legislature to impose: *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 162, 163. The same reasoning applies with equal force to the tax on collateral inheritances: *State v. Maine Cent. R. R. Co.*, 74 Me. 882.

The constitution guarantees to the citizen the right of acquiring, <sup>505</sup> possessing, and protecting property (art. 1, sec. 1), which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our constitution or that of the United States which secures the right to any one to control or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right: 2 Blackstone's Commentaries, 10-13; *Strode v. Commonwealth*, 52 Pa. St. 181. At common law, prior to the statute of distribution in England, 22 and 23 Car. 11, descent of personal property

could hardly be recognized, and even after the statute requiring administration to be granted, the administrator, after the payment of the debts and funeral expenses of the deceased, was entitled to retain to himself the residue of his effects, the court holding that there was no power to compel a distribution: 2 Blackstone's Commentaries, 515; *Edwards v. Freeman*, 2 P. Wms. 442.

Degrees of kindred and the laws of descent, in the several states of the union, differ widely. In this state there have been frequent changes in the law governing the subject. It is entirely within the province of the legislature to determine who shall and who shall not take the estate, and the proportion in which they may take, and whether severally or as joint tenants, *per capita* or *per stirpes*. In the absence of constitutional prohibition the legislature is supreme, and may dispose of an intestate decedent's estate, after payment of his debts, to any class or classes of his kindred, to the exclusion of any class or classes. It may limit heirship to lineal descendants, to the absolute exclusion of all collaterals. If it permits, as our laws now do, collateral kindred to inherit, no reason is perceived why the state is debarred from exacting an excise or duty from such collateral, for such privilege allowed by the state. It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent.

§ 66 The right to dispose of estates by will is of very ancient origin, but is a creature of municipal law, and not a natural right: Redfield on Wills, c. 1, sec. 1; *Mager v. Grima*, 8 How. 494. Before the statute of wills in England, 32, 34, and 35 Henry VIII., the right did not extend to real estate, and was limited as to personal, if the testator left a widow or children. If he had both he could dispose of but one-third of his personal estate by will; if but one he could dispose of one-half. This right has since been extended by statute to include real estate, and all personal. The restriction has never existed in this country, except as to widows, where right to dower and a share of the personal estate is secured by statute in most of the states, and in Louisiana, where the rules of the civil law prevail. Our statute of wills authorizes certain persons to make wills, and prescribes the mode of their execution. This

is a statute right, and it is competent for the law-making power to modify or take away the right. If the right itself can be wholly destroyed it must be competent to impose conditions and limitations upon it. The greater always includes the less.

While it has always been the policy of our law to allow collaterals to inherit, in default of lineal descendants, and to allow the disposal of estates by will, which take effect only at the death of the owner, and when his ownership has ceased the policy may be changed if the legislature so determine; and it is competent for it, if it chooses, to retain this general policy, and to annex to the privilege of taking a decedent's property, by descent or will, such conditions as it may deem wise. An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation when the state allows him to take a property subject to a duty of two and one-half per cent, when the state has the right to exclude him from the whole.

The exemption from the tax of certain classes, not any part of the classes taxed, is unobjectionable on constitutional grounds: *State v. Western Union Tel. Co.*, 73 Me. 527.

507 We think the act of 1893 imposed an excise tax upon certain inheritances and devises and conveyances, to take effect after the death of the grantor; and is not a tax upon property within the meaning of article 9, section 8, of the constitution, and does not conflict with any provision of the constitution of Maine.

It is claimed by the appellant that the act is in conflict with the fourteenth amendment to the constitution of the United States, which prohibits any state from depriving "any person of life, liberty, or property, without due process of law." It is argued that the act fails to furnish sufficient means to parties interested for the protection of their rights, and confers upon probate courts powers and duties not authorized or contemplated by our constitution. The act (sec. 12) provides for an appraisal of the estate subject to the excise, upon application to the probate court by the state assessors, or any person interested in the estate; and section 13, the probate court, having jurisdiction of the settlement of the estate, is authorized to "hear and determine all questions in relation to said tax that may arise," etc., "subject to appeal as in other



cases." These provisions fully secure the rights of all parties interested, and satisfy the requirement of "due process of law." The act applies equally to citizens of this and other states, and therefore is not in conflict with another provision of the fourteenth amendment, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Whether the parties subject to the excise take by will or descent it is only under and by virtue of the laws of this state that the right or privilege to take at all exists; and when that law places all upon an equality, as this act does, there can be no violation of this constitutional provision, in letter or spirit.

The question whether the exemption of five hundred dollars in the first section is an exemption from the *corpus* of the estate, or a several exemption of that sum from each portion of the estate passing by will or descent to persons outside the exempted classes, is raised by the appeal. A careful examination of the statute satisfies us that the legislature intended the exemption <sup>500</sup> to apply to each taker within the class subject to the duty. The language of section 1 is that "all property . . . which shall pass by will or by the intestate laws of this state . . . other than to or for the use of the father," etc., . . . "shall be liable to a tax of two and one-half per cent of its value above the sum of five hundred dollars," etc., and any grantee under a conveyance made during the grantor's life, to take effect after his death, "shall be liable for all such taxes." It is difficult to construe this language to mean other than that such taker, subject to the tax, shall be liable upon the amount received above five hundred dollars. A grantee is made liable to "such taxes." What taxes? Plainly, two and one-half per cent upon the amount received in excess of five hundred dollars. This construction is greatly aided by the second section, which, in dealing with limited estates to the excepted classes (whether including all or part of decedent's estate), and remainder to the taxable class, provides for an appraisal of the value of the limited estate, and when that is ascertained that value, "together with the sum of five hundred dollars," is to be deducted from the value of such property, and the remainder becomes subject to the tax or duty. This provision is plainly inconsistent with the claim that the five hundred dollars exemption is to be taken once for all from the *corpus* of decedent's entire estate. The legislature undoubtedly intended the same rule to apply

in both sections. We think, therefore, that the decree of the probate court was correct, and the entry must be, decree of probate court affirmed.

**COLLATERAL INHERITANCES—TAXATION OF—CONSTITUTIONALITY OF LAW AFFECTING.**—The state, having the control over the domicile of a decedent person, may impose a succession or inheritance tax upon any person who succeeds to all or any portion of his real estate located in that state, or to his personal property, no matter whether the latter is situated in that or in another state. Such a tax is not a tax on property, but on the privilege of succeeding to the inheritance, and it may be validly laid and collected, although the property is also taxed. Statutes imposing a tax of this nature are uniformly ruled to be valid, and not in conflict with constitutional principles or provisions, state or national. Earl, J., in speaking for the court in *Matter of McPherson*, 104 N. Y. 306–316, 58 Am. Rep. 502, said: “We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select the objects of taxation. It may impose all the taxes upon lands, or all upon personal property, or all upon houses or upon incomes. Taxes upon legacies and inheritances have been approved generally by writers upon political economy, and systems of taxation, and no tax can be less burdensome, and interfere less with the productive and industrial agencies of society. Such taxes were imposed in Rome two thousand years ago, and are now imposed in England and several of the continental countries of Europe, and in the states of Pennsylvania, Maryland, and Virginia, and perhaps other states of this country. The acts imposing such taxes have frequently come before the courts, and have uniformly been upheld: *Carpenter v. Commonwealth*, 17 How. 456; *Scholey v. Rew*, 23 Wall. 331; *Wright v. Blakeslee*, 101 U. S. 174; *Mason v. Sargent*, 104 U. S. 689; *Short’s Estate*, 16 Pa. St. 63; *Stinger v. Commonwealth*, 26 Pa. St. 422; *Commonwealth v. Freedley*, 21 Pa. St. 33; *Hood’s Estate*, 21 Pa. St. 106; *Strode v. Commonwealth*, 52 Pa. St. 181; *Eyre v. Jacob*, 14 Gratt. 422; 73 Am. Dec. 367; *Miller v. Commonwealth*, 27 Gratt. 110; *Tyson v. State*, 28 Md. 578; *William’s case*, 3 Bland, 186. It is not very important to determine in this case whether the act is to be regarded as imposing a tax upon property, or upon the succession or devolution of property by will or intestacy. In either case it is a special tax. In one case it is a tax upon the particular class of property, and in the other case a tax upon the succession or devolution of property, or the right to receive property in the cases mentioned in the statute. Whether it be one or the other it is free from constitutional objection. It has never been questioned that the legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business, and upon all transfers. Taxes of similar character were quite extensively imposed by acts of Congress passed during the late civil war. If this be regarded as a tax upon property, then it is free from constitutional objection if it be equally imposed and properly apportioned upon all the property of the class to which it belongs.”

Speaking of a collateral inheritance tax and the constitutionality of the statute imposing it, the court, in *State v. Dalrymple*, 70 Md. 294–298, said: “There can be no doubt that the legislature has the power to impose it, not only where it affects citizens of the state, but also where nonresidents are

aliens claim by inheritance or by will, property located here. Every state in the union, in the absence of constitutional prohibition, has the authority to regulate by law the devolution and the distribution of an intestate's property, situated within the jurisdiction of that state, and personal property situated elsewhere but owned by a resident, and to prescribe who shall, and who shall not, be capable of taking it. Possessing, then, the plenary power indicated, it necessarily follows that the state in allowing property actually located here, or personal property situated elsewhere but owned by a resident, to be disposed of by will, and in designating who shall take such property when there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law as the legislature may deem expedient. These conditions, subject to the limitations named, are, consequently, wholly within the discretion of the general assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and one-half per cent into the treasury of the state. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transmitted by will or by descent or distribution."

That succession to an inheritance may be taxed as a privilege, although the property of the estate is taxed, and taxes on property are required by the constitution of the state to be equal and uniform, has been expressly determined in several cases: *Eyre v. Jacob*, 14 Gratt. 422; 73 Am. Dec. 367; *Tyson v. State*, 28 Md. 577.

The constitutionality of laws imposing a tax on inheritances has never been judicially doubted except in *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337, where it was decided that the enactment of such a law was not within the constitutional power of the legislature because it was not equal and uniform in its operation.

A statute imposing a collateral inheritance tax is not in conflict with the fourteenth amendment to the constitution of the United States: *Wallace v. Myerz*, 38 Fed. Rep. 184. Such a tax is not a direct tax upon the property itself, but merely an impost or excise imposed by the state for the privilege accorded in permitting property situated therein to be transmitted by will or by descent or distribution: *Scholey v. Rew*, 23 Wall. 331; *Estate of Merriman*, 141 N. Y. 479; *Tyson v. State*, 28 Md. 577; *Miller v. Commonwealth*, 27 Gratt. 110; *Eyre v. Jacob*, 14 Gratt. 422; 73 Am. Dec. 367. An estate not passing by a will that is operative within the state, or under the intestate laws thereof, or by deed or grant intended to take effect after the death of the decedent, is not subject to a collateral inheritance tax imposed by the state: *Orcutt's Appeal*, 97 Pa. St. 179. Such tax cannot be imposed when neither the personal property taxed nor the domicile of its owner is within the state at the time of his death: *Hood's Estate*, 21 Pa. St. 106. An act imposing such tax as a direct tax upon property devised to or inherited by collateral heirs or devisees is, in so far as it imposes the tax upon real estate situated in other states, in excess of legislative power, and cannot be enforced: *Estate of Bittinger*, 129 Pa. St. 338.

When ancillary administration is granted, the state may impose a collateral inheritance tax on all personal property of the decedent situated

within the state: *Alvany v. Powell*, 2 Jones Eq. 51; *State v. Dabrymple*, 70 Md. 294.

A general taxation statute which fails to mention or impose a collateral inheritance tax operates as a repeal of a former law imposing such tax: *Fox v. Commonwealth*, 16 Gratt. 1; *Miller v. Commonwealth*, 27 Gratt. 110-113.

The law relating to such tax as it exists at the time of final judgment, and not as it existed at the time of an appeal, must control: *Montague v. State*, 54 Md. 481.

If an administrator or executor pays over money of his decedent to a collateral distributee or legatee, without retaining therefrom the collateral inheritance tax, it becomes, to the extent of the tax, money had and received by him for the use of the state, and *assumpsit* may be maintained against the legatee or distributee therefor: *Montague v. State*, 54 Md. 481; or the personal representative of the decedent is chargeable with the amount of such tax out of the assets in his hands: *Short's Estate*, 16 Pa. St. 63. Although personal property within the state is not subject to the general tax law, yet it may be subject to a collateral inheritance tax: *Estate of Knædler*, 140 N. Y. 377. The right of the state to a collateral inheritance tax is not defeated by a conveyance or transfer of title to property during the lifetime of the owner, nor by possession taken under such conveyance, if the enjoyment of the property conveyed is not intended to take effect until the death of the grantor: *Line's Estate*, 155 Pa. St. 378.

*Persons Affected.*—The legislature of a state has power to impose a collateral inheritance tax not only when it affects citizens of the state, but also when nonresidents or aliens claim by will or inheritance property located in the state: *State v. Dabrymple*, 70 Md. 294; *Mager v. Grima*, 8 How. 490; *Scholey v. Rew*, 23 Wall. 331; *Commonwealth v. Smith*, 5 Pa. St. 142.

Corporations are included under the term "persons" in a statute imposing such tax, unless exempted in terms or by necessary implication: *Miller v. Commonwealth*, 27 Gratt. 110. A statute conferring upon a charitable corporation a limited privilege of taking and holding real and personal property does not relieve it from such tax: *Estate of Prime*, 136 N. Y. 347; but a corporation whose property is exempt from taxation to the extent of its capacity to take and hold property is exempt from such tax: *Vassar's Estate*, 127 N. Y. 1. The exemption of a foreign corporation from taxation under the laws of the jurisdiction of its origin does not exempt it from the payment of a collateral tax imposed by the law of another state where it inherits a legacy: *Cutlin v. Trustees of Trinity College*, 113 N. Y. 133. And the exemption of any religious, educational, or charitable corporation, or corporation organized for other than business purposes, from a collateral inheritance tax, extends only to domestic corporations, and does not exempt foreign corporations of the character named: *Estate of Prime*, 136 N. Y. 347. Bequests to colleges and churches are liable to such tax unless specially exempted: *Barringer v. Cowan*, 2 Jones Eq. 436.

An adopted child given the right to inherit by statute is not exempt from the payment of such tax: *Commonwealth v. Nancrede*, 32 Pa. St. 389. An adopted child is not within the term "children" in a law defining what relatives of a decedent shall be exempt from the payment of such tax: *Estate of Miller*, 110 N. Y. 216; and an amendatory act exempting such adopted children from the payment of the tax does not exempt a legacy made to an adopted child before the passage of such amendment: *Estate of Miller*, 110 N. Y. 216. A grandmother taking an intestate's estate is subject to the tax: *McDowell v. Addams*, 45 Pa. St. 430. A statute exempting

from the collateral inheritance tax property passing to children and lineal descendants born in lawful wedlock does not exempt an adopted child from the payment of the tax on a legacy bequeathed to him, nor does it exempt an illegitimate child, although by an act of the legislature such child, previous to the death of the testator, is made the heir of the latter, and capable of inheriting his property as if he had been begotten in lawful wedlock: *Commonwealth v. Ferguson*, 137 Pa. St. 595.

**PROPERTY AFFECTED.**—*Personal property* of a resident decedent, whether situated within or without the state, is subject to the collateral inheritance tax law: *Estate of Swift*, 137 N. Y. 77. Such tax becomes due and payable immediately upon the death of the decedent, and the property liable thereto should be appraised and the tax assessed as soon after such death as possible. *Estate of Vassar*, 127 N. Y. 1. It is imposed only on what remains for distribution after the expenses of administration, debts, and rightful claims of third parties are paid or provided for: *Orcutt's Appeal*, 97 Pa. St. 179; *Line's Estate*, 155 Pa. St. 378; and an exemption of a certain portion of the estate from such tax applies not to the whole estate, but to the portion passing to each devisee or legatee: *Howe's Estate*, 112 N. Y. 100. And with this limitation the estate of a decedent composed of United States bonds or securities, no matter where deposited, is subject to such tax in the state of his domicile at the time of his death: *Orcutt's Appeal*, 97 Pa. St. 179. Stock of a foreign corporation held by an executor as such, and as part of the estate, is in fact a part thereof, and the right of succession thereto is subject to such tax: *Estate of Merriman*, 141 N. Y. 479; *Strode v. Commonwealth*, 52 Pa. St. 181. And the tax should be assessed upon the basis of the value of the bonds: *Wallace v. Myers*, 38 Fed. Rep. 184. Upon the death of the grantor such tax is chargeable on stock and bonds transferred by a citizen of the state to a foreign corporation doing business out of the state, with income payable to the grantor for life, and on his death the property to be divided among designated persons, with the right in the grantor to make any change in the disposal to be made of his property after his death, although no change is made, if there are no debts owing by the grantor in such foreign state at the time of his death, and no collateral inheritance tax is paid there: *Line's Estate*, 155 Pa. St. 378.

The interest of a nonresident at the time of his death in the estate of his deceased brother within the state, consisting of bank and other stocks, bonds, and cash, is property within the state, subject to a collateral inheritance tax: *State v. Dalrymple*, 70 Md. 294. The capital stock and land of a limited partnership whose business and property are within the state where it was organized is property within the state, and subject to its collateral inheritance tax, although the partner seized thereof at the time of his death, and by whom it was devised to residents of the state, was himself a nonresident: *Small's Estate*, 151 Pa. St. 1. Under a will directing executors to pay a stated sum to a certain church towards the building of a new church or the renovation of the present one, the money is subject to the collateral inheritance tax, and is not exempt under a statute exempting buildings used for public worship from taxation: *Estate of Van Kleeck*, 121 N. Y. 701. A statute providing that the personal estate of religious corporations shall be exempt from taxation, including a collateral inheritance tax, is prospective in its operation, and does not apply to a tax becoming due and payable before its passage: *Estate of Van Kleeck*, 121 N. Y. 701.

Personal property of a nonresident invested or habitually kept within the state is subject to a collateral inheritance tax imposed on property of a

resident which passes by will or by the intestate laws of the state, or, if the decedent was a nonresident, on property "within the state": *Estate of Romaine*, 127 N. Y. 80; *Alamy v. Powell*, 2 Jones Eq. 51. The words "being in this state," in a statute imposing such tax upon "all assets of every kind passing from any person who may die seised and possessed thereof being in this state," refer to property and not to the person; and property actually within the state, although for other purposes it may be treated as constructively elsewhere, because of the owner's nonresidence, is subject to the tax: *State v. Dalrymple*, 70 Md. 294. Money received under a power of appointment created by will passes "by will" within the meaning of a statute taxing collateral inheritances: *Estate of Stewart*, 131 N. Y. 274. The entire interest of legatees, and not merely half of its value, in tangible personal property having an actual *situs* in the state is subject to such tax where the claim by the testator's widow to take under the intestate law, instead of under the will, is compromised and relinquished, without half of the personalty to which she would have been entitled under such law ever having been ascertained, and the legatees have received and hold the entire interest specifically bequeathed to them: *Small's Estate*, 151 Pa. St. 1. An increase or interest derived from an estate by the executors or administrators is not subject to such tax, as only the property of which a person dies seised or possessed is subject thereto: *Estate of Vassar*, 127 N. Y. 1. No collateral inheritance tax is imposed in Maryland on an annuity passing under the terms of a will: *Citizens' Nat. Bank v. Sharp*, 53 Md. 521.

A policy of insurance upon the life of a decedent held by him at the time of his death, payable to his executors or personal representatives, is subject to a collateral inheritance tax: *Estate of Knoedler*, 140 N. Y. 377.

A bequest to the United States is subject to such tax by the state: *Estate of Merriman*, 141 N. Y. 479.

The tax is not payable on a sum of money which collateral legatees authorize the executor to pay to a disinherited son of the testator in compromise of a contest to his will: *Pepper's Estate*, 159 Pa. St. 508; nor can the tax be imposed upon money paid to extinguish the title of a person claiming adversely to the decedent, or upon property surrendered by way of compromise of his adverse claim: *Kerr's Estate*, 159 Pa. St. 512.

*Real Estate* situated out of the state owned by a decedent residing in the state at the time of his death is not subject to a collateral inheritance tax: *Estate of Bittinger*, 129 Pa. St. 338; *Estate of Swift*, 137 N. Y. 77; even after it has been converted into money which is in the hands of executors: *Estate of Swift*, 137 N. Y. 77. When a testator directs that real estate situated in another state shall be sold, and the proceeds invested in mortgages in such state, the proceeds are not subject to such tax in the state in which the testator is domiciled at the time of his death: *Hale's Estate*, 161 Pa. St. 181. When a will gives an estate to a testator's widow, upon express condition that she pay certain legacies to collateral relatives, the gifts to such legatees are direct and subject to the tax. And if, under such will, the widow has power to take the residue to her own use during her life, with disposition over, a gift over of any property of which she shall die seised is not liable to the tax during her life: *Estate of Nieman*, 131 Pa. St. 346. Property conveyed in trust by the grantor for purposes set forth in his will, the transfer to take effect upon his death, is subject to a collateral inheritance tax: *Seibert's Appeal*, 110 Pa. St. 329. A deed made in consideration of the grantee's payment of all debts made or incurred by the grantor before his death, and conditioned to be void if the grantee died before the grantor, is not intended

to take effect until the death of the latter, and is, therefore, subject to such tax: *Appeal of Du Bois*, 121 Pa. St. 388. When a will gives the testator's widow a life estate with limited power of disposition of the whole estate for her use and enjoyment, leaving the interest of other legatees dependent upon this power of disposition being exercised by the life tenant during her life, there is no basis upon which the interest of such legatees can be appraised, and therefore no basis for the imposition of the collateral inheritance tax: *Oager's Will*, 111 N. Y. 343. A legacy in remainder to collateral kindred is liable to such tax: *Attorney General v. Pierce*, 6 Jones Eq. 240. Contingent interests in estates given by will under a power of appointment, although not capable of valuation at the testator's death, are, after they become vested by appointment, subject to the tax: *Estate of Stewart*, 131 N. Y. 274. Under the Pennsylvania law, when the land of an intestate passes to his parents for life, and at their death to collateral heirs, the state is entitled to the collateral inheritance tax upon the appraised value of the land, less the amount of decedent's debts unpaid by his personal estate: *Commonwealth's Appeal*, 127 Pa. St. 435. Remainders under a will by which the testator creates certain trusts for the benefit of certain designated persons, with remainders to such of his designated nephews and nieces as shall be living at the time of the termination of each trust, or, if dead, to their issue then living, are not liable to such tax until the termination of such trust: *Estate of Curtis*, 142 N. Y. 219.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MICHIGAN.**

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**DRAKE v. CLOONAN.**

[99 MICHIGAN, 121.]

**PLEDGE—ASSIGNMENT OF BY ADMINISTRATOR.**—An administrator may sell at private sale, without notice, his interest in securities held by the decedent as pledgee, at the time of his death, without demanding payment of the pledgor. The rights of the latter are not affected by such assignment.

**PLEDGE—ASSIGNMENT OF.**—A pledgee of personalty or securities cannot, to the injury of his pledgor, transfer the pledge or divest the pledgor of title thereto until he has demanded payment, and given the pledgor opportunity to redeem, and then only at public sale and on notice.

*A. Perry*, for the appellant.

*J. Ten Eyck*, for the appellee.

**121** MONTGOMERY, J. On the first day of April, 1880, Junius Ten Eyck was the owner of five promissory notes made by defendant, Stephen J. Cloonan, payable to Ten Eyck or bearer, aggregating seven hundred dollars, and secured by mortgage on real estate. On that date he borrowed of Pomroy Stiles five hundred dollars, and gave his note, due on or before one year after date, **122** for that amount, and delivered said notes and mortgage to Stiles, with the following memorandum:

“The mortgage hereto annexed, executed by Stephen J. Cloonan, is left with the within named P. Stiles as security for this note, and, when this note is paid, the said mortgage and notes to be redelivered to me.

“Dated April 1, 1880.

J. TEN EYCK.”

The note given by Ten Eyck, the five Cloonan notes, the mortgage, and the above memorandum were then attached together, and delivered to Stiles. On the thirty-first day of July, 1883, Pomeroy Stiles died testate, and George P. Stiles was appointed administrator of his estate, with the will annexed, and these securities were by him transferred to one Le Baron, who transferred them to one Owen to be collected, who in turn, by direction of Le Baron, transferred them to complainant with similar instructions. This bill is filed, making Ten Eyck and Cloonan parties, asking that the complainant be declared to have a lien upon the notes and mortgage to the amount of the Ten Eyck note, and that, unless redeemed, a sale be had to satisfy the demand. The circuit judge dismissed the bill, and complainant appeals.

We are not apprised of the grounds upon which the circuit judge proceeded. The defense insisted on in this court is that the transaction between Ten Eyck and Pomeroy Stiles amounted to a personal pledge, and that when the representative of the pledgee transferred the securities without having demanded payment of Ten Eyck, and, at a private sale without notice, he forfeited his right to the pledge, and passed no title to Le Baron which he could convey to complainant. We cannot perceive the force of this contention. It is undoubtedly quite correct to say that a pledgee of personal property or securities cannot, to the injury of his pledgor, transfer property or securities pledged, or divest the pledgor of title to them, until he <sup>123</sup> has demanded payment, and given the pledgor opportunity to redeem, and then only at public sale and on notice. But the cases in which this question has arisen have naturally been cases in which an attempt has been made so to divest the owner of his property. Such was not the case here, as we understand the record. The attempt on the part of the pledgee's administrator was simply to transfer to Le Baron the interest which he, as administrator, held in the securities pledged. This was no fraud upon the pledgor, and no wrong to him. He occupied precisely the same position as before, and could redeem the pledge on the same terms. He was only concerned in having an opportunity to get back his securities on paying his note. This he has not been prevented from doing. In Jones on Pledges, section 418, it is said:

"The pledgee may assign his interest in the pledge, and the assignee will stand in his place. The lien of a pledge

cannot be separated either from the possession of the pledge or from the debt, so that, to make an effectual sale, both must pass to the assignee. Therefore, if the pledge alone be assigned, unless it be negotiable paper or a chose in action having the legal qualities of such paper, payment or tender may be made to the original pledgee, who retains the debt, and then the assignee of the pledge is liable in trover for the pledge. As the security, however, is a mere incident of the principal debt, just as a mortgage is a mere incident of the debt secured, an assignment of the debt passes either a legal or equitable interest in the pledge, unless it is otherwise agreed between the parties."

The doctrine of the text is abundantly supported by authority; and it is held, also, that the original contract of pledge is not put an end to by repledging the thing pledged, and that the original pledgor cannot recover it without having first tendered or paid the amount of his debt secured by the pledge: See Jones on Pledges, sec. 420.

It is also argued that the assignment by the administrator <sup>124</sup> of the notes and mortgage in question was for the payment of his own debt; but an examination of the testimony does not support this contention. On the contrary, it appears that there was a sale of the securities for cash to Le Baron. As to the right of the administrator to transfer pledged securities, see Jones on Pledges, section 482.

The decree below will be reversed, and a decree entered in this court for a foreclosure of the mortgage. Any surplus that may be realized, over and above sufficient to pay off the indebtedness owing by Ten Eyck on the note executed by him, will be payable to the defendant, Ten Eyck. The complainant will recover costs of both courts.

MCGRATH, C. J., GRANT and HOOKER, JJ.; concurred. LONG, J., did not sit.

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PLEDGE—ASSIGNMENT OF BY PLEDGEE—ERROR.—This question is fully treated in the extended notes to *Griggs v. Day*, 32 Am. St. Rep. 724, and *Bolling v. Kirby*, 24 Am. St. Rep. 797. See, also, *Dimock v. United States Nat. Bank*, 55 N. J. L. 296; 39 Am. St. Rep. 642, and note.

**PEOPLE v. BELLET.**

[90 MICHIGAN, 151.]

**CONSTITUTIONAL LAW—SUNDAY LAWS—BARBERS.**—A statute making it unlawful for barbers to carry on their business on the first day of the week, known as Sunday, and excepting from its operation such persons engaged in such business as conscientiously believe the seventh day of the week should be observed as Sunday, and actually refrain from secular business on that day, is within the police power of the state, and not unconstitutional as class legislation, nor as depriving any person of life, liberty, or property without due process of law, nor as denying any person the equal protection of the law.

**CONSTITUTIONAL LAW.—CLASS LEGISLATION** is such as denies rights to one which are accorded to others, or inflicts upon one a more severe penalty than is imposed upon another in like case offending.

**CONSTITUTIONAL LAW—SUNDAY LAWS AS SANITARY REGULATION.**—The police power of the state may be exercised, as a necessary sanitary regulation, to prohibit citizens from engaging in secular pursuits on Sunday, although such pursuits are noiseless and harmless in themselves.

*G. F. Robinson, for the appellant.*

*A. A. Ellis, attorney general, and A. H. Frazer, prosecuting attorney, for the people.*

**152 MONTGOMERY, J.** The respondent was convicted of a violation of the provisions of act No. 148, Laws of 1893, and the sole question presented for our consideration is whether the act in question is constitutional. The act provides:

“That it shall be unlawful for any person or persons to carry on or engage in the art or calling of hair-cutting, shaving, hair-dressing, and shampooing, or in any work pertaining to the trade or business of a barber, on the first day of the week, commonly called Sunday, except such person or persons shall be employed to exercise such art or calling in relation to a deceased person on said day.

“**SEC. 2.** That it shall be unlawful for any such person or persons to keep open their shops or places of business aforesaid on said first day of the week, commonly called Sunday, for any of the purposes mentioned in section one of this act. *Provided, however,* that nothing in this act shall apply to persons who conscientiously believe the seventh day of the week should be observed as the Sabbath, and who actually refrain from secular business on that day.”

**153** It is urged that the act is invalid because it conflicts with section 32 of article 6 of the constitution of this state, which provides, among other things, that no person shall be deprived of life, liberty, or property without due process of

law, and for the further reason that it is in conflict with the fourteenth amendment of the constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is conceded that the state, in the exercise of its police power, has the right to enact Sunday laws, and that it also has the right to provide for the regulation and restriction of those engaged in an employment which, in and of itself, may prove harmful to the community, such as the liquor traffic. But it is contended that the business of conducting a barber-shop is not of this class, and that it is in the nature of class legislation to prohibit this business under more severe penalties than those provided for the conduct of other legitimate business on Sunday. We do not deem the act in question open to such objection. By class legislation, we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case. offending. In *Cooley on Constitutional Limitations* (\*p. 390, 6th ed., p. 479), it is said:

"Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. They may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. . . . The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the <sup>154</sup> rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit; and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge."

In *Lieberman v. State*, 26 Neb. 464, 18 Am. St. Rep. 791, an

ordinance of the city prohibited the keeping open of any business house, bank, store, saloon, or office, excepting telegraph offices, express offices, photograph galleries, railroad offices, telephone offices, hotels, restaurants, cigar-stores, eating-houses, ice-cream parlors, drug-stores, etc. It was contended that the ordinance was open to the objection that it did not operate upon all citizens alike; that the respondent was compelled to close his place of business on Sunday, while drug-stores, tobacco-houses, and others in competition in business were not required to do so. But the court held the act valid. In the present case it may have been the judgment of the legislature that those engaged in the particular calling were more likely to offend against the law of the state providing for Sunday closing than those engaged in other callings. If so, it became a question of policy as to whether a more severe penalty should not be provided for engaging in that particular business on Sunday than that inflicted upon others who refuse to cease from their labors one day in seven.

2. Another question which naturally presents itself, but which has not been discussed by respondent's counsel, is whether the law is open to the objection that it is class legislation, for the reason that those who observe the seventh day of the week as the Sabbath are excepted from its provisions.<sup>155</sup> It has been held in one case (*City of Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553) that such a provision is unconstitutional, because it discriminates between religious sects. But we find that such an exception to the general statute of this state relative to the observance of Sunday has been in force since 1846: See Howell's Statutes, sec. 2021. And, while this question has never been directly passed upon, the validity of the act in question has been assumed in a large number of cases. A similar question was raised in *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577, and the clause was held not to conflict with a provision of the constitution which reads: "The general assembly shall not grant to any citizen, or to any class of citizens, privileges or immunities which, upon the same terms, shall not belong equally to all citizens."

It was said: "The framers of the statute meant to leave it to the consciences and judgments of the citizens to choose between the first and the seventh day of the week. One or the other of these days, they must refrain from common labor. Which it shall be is to be determined by their own

consciences. It was not the purpose of the lawmakers to compel any class of conscientious persons to abstain from labor upon two days in every week."

The supreme court of Ohio has gone so far as to hold that a statute which did not contain such an exception was for that reason unconstitutional: See *City of Cincinnati v. Rice*, 15 Ohio, 225; *City of Canton v. Nist*, 9 Ohio St. 439.

The better reason for maintaining the police power to prohibit citizens from engaging in secular pursuits on Sunday is the necessity of such regulation as a sanitary measure. As to those employments which are noiseless and harmless in themselves, and conducted in a manner not calculated to offend those who, from religious scruples, observe Sunday as the Lord's day, this necessity appears <sup>156</sup> to be the only valid source of legislative power; and this is based upon the fact that experience has demonstrated that one day's rest is requisite for the health of most individuals, and not all individuals possess the power to observe a day of rest of their own volition. As is well said by Mr. Tiedeman: "If the law did not interfere, the feverish, intense desire to acquire wealth, so thoroughly a characteristic of the American nation, inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation, by resting periodically from labor, even if the mad pursuit of wealth should not warp their judgment and destroy this instinct. Remove the prohibition of law, and this wholesome sanitary regulation would cease to be observed": Tiedeman's *Limitations of Police Power*, 181.

In Cooley's *Constitutional Limitations* (\*p. 477, 6th ed., p. 584), it is said: "It appears to us that, if the benefit to the individual is alone to be considered, the argument against the law which he may make who has already observed the seventh day of the week is unanswerable."

The obligation to cease from secular pursuits on one day of the week does not discriminate either in his favor or against him.

We think the statute under consideration is within the police power of the state, and not in conflict with any express provision of the constitution, and that it does not conflict with the fourteenth amendment of the constitution of the United States.



It follows that the conviction should be affirmed, and the case remanded, with directions to the recorder to proceed to judgment.

The other justices concurred.

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**SABBATH-BREAKING—OBSERVANCE OF DIFFERENT DAY AS DEFENSE.**—Where a city ordinance prohibits all persons from engaging in certain kinds of business on the day known as Sunday, but excepts from its operation those who conscientiously observe the seventh day of the week as the Sabbath, the fact that a person believes that the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception: *Lieberman v. State*, 26 Neb. 464, 18 Am. St. Rep. 791, and note. Seventh-day Adventists, Jews, and others who conscientiously keep the seventh day of the week to worship God are as much bound to refrain from business or worldly employment on Sunday under a statute prohibiting the same as any other persons: *Specht v. Commonwealth*, 8 Pa. St. 312; 49 Am. Dec. 518, and note; *Scales v. State*, 47 Ark. 476; 58 Am. Rep. 768, and extended note; *Society etc. v. Commonwealth*, 52 Pa. St. 125; 91 Am. Dec. 139.

**STATUTES—VALIDITY—CLASS LEGISLATION.**—A statute which selects particular persons from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations from which others in the same class or locality are exempt, is unconstitutional: *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22, and note; *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 863, and extended note. See, also, the extended note to *State v. Elliot*, 21 Am. St. Rep. 781.

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## FERGUSON v. OLIVER.

[99 MICHIGAN, 161.]

**JURISDICTION—APPEARANCE IN FOREIGN COURT.**—A general appearance without personal service by a defendant residing in one state, in an action against him in the court of another state or country having general jurisdiction of the subject matter, confers jurisdiction of his person. He cannot afterwards question the jurisdiction when a judgment based upon such appearance is in question.

**JURISDICTION—GENERAL APPEARANCE—DISMISSAL OF DEFENSE.**—A general appearance, without personal service, by a defendant in an action against him in a court having jurisdiction of the subject matter, confers jurisdiction of his person, and the fact that the court strikes out his answer or defense as insufficient does not deprive it of jurisdiction, nor invalidate its judgment.

**JURISDICTION—IRREGULARITY AS AFFECTING JUDGMENT.**—Jurisdiction of the parties and subject matter having been obtained, any irregularity in the action of the court, however gross, does not render its judgment a nullity.

*Keena and Lightner*, for the appellants.

*T. G. Campbell*, for the appellee.

<sup>161</sup> **MONTGOMERY, J.** This is an action upon a judgment obtained in favor of the plaintiffs and against defendant in the common pleas division of the high court of justice for the province of Ontario. There was no service of process on the defendant in the original suit made within the province of Ontario. A summons was served in Gladwin county, in this state.

<sup>162</sup> It is the settled law of this state that a Canadian or foreign court cannot make its judgments conclusive upon a resident of Michigan by service made in this state upon one who refuses to recognize the jurisdiction of such foreign court: *McEwan v. Zimmer*, 38 Mich. 765; 31 Am. Rep. 332. In the present case, however, the judgment, after reciting the service in Michigan, has the following further recitation: "And the said defendant having appeared, and having filed and delivered a statement of defense to the action, and it having been ordered by an order of the master in chambers, dated the nineteenth day of December, 1892, on the application of plaintiffs, that the said statement of defense should be struck out, and that the plaintiffs should be at liberty to proceed in this action as in case of default of a statement of defense."

The plaintiffs contend that the appearance gave the court jurisdiction of the case as completely as would an actual service of process within the jurisdiction of the court. On the other hand, it is contended that the record shows that the court denied the right of the defendant to be heard, and that for this reason he is not concluded.

It is well settled that the appearance of a defendant supplies the place of personal service, and that a defendant who has appeared generally in a proceeding before a court having general jurisdiction of the subject matter cannot afterwards be heard to question the jurisdiction of the court when its judgment based upon such appearance is in question: See *Black on Judgments*, sec. 225; *Manhard v. Schott*, 37 Mich. 235; *Corbitt v. Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586; *Cofrode v. Circuit Judge*, 79 Mich. 339. In the present case there was such an appearance. The jurisdiction of the Canadian court became complete.

Was the court divested of its jurisdiction by the order dismissing the statement of defense? We think not. One of <sup>163</sup> the questions which that court was called upon to decide was the sufficiency of the pleadings. The ground upon which the statement of defense was stricken out is not stated, and

for aught that appears this action may have been consistent with the rules of practice obtaining in that court, and have been based wholly upon the insufficiency of the pleading itself. It will not do to say that the defendant may appear and submit a defense to that court, and, when the court has held it insufficient, attempt the same defense in an action founded upon the judgment. Defendant's counsel cites the case of *Windsor v. McVeigh*, 93 U. S. 274, as sustaining his contention. In that case it appeared that a proceeding to condemn certain property had been instituted, and a monition published which stated that at the trial all persons interested in the land, or claiming an interest, might appear and make their allegations in that behalf, and warned all persons to appear at the trial and show cause why condemnation should not be decreed, and to intervene for their interest. The owner of the property, in response to the monition, appeared, and filed a claim to the property and an answer to the libel. On motion of the plaintiff's attorney, both the appearance of the respondent and his answer were stricken from the files on the ground that it appeared that he was at the time within the confederate lines, and a rebel. The court, in *Windsor v. McVeigh*, 93 U. S. 274, where such condemnation was attacked collaterally, held that the judgment was not binding. But we think that case is clearly distinguishable from the present. It there affirmatively appeared that the defendant was denied the right to make any defense in any form. The distinct determination was that he should not be privileged to appear in the case and defend it. The court held that this was denying him any opportunity to be heard, and that the judgment did not constitute judicial determination of his rights, and was not entitled to respect in any <sup>164</sup> other tribunal. In the present case there is nothing which shows a denial of the right of defendant to appear, and, as before stated, for aught that appears, there may have been sufficient grounds to justify the Canadian court in striking out the statement of defense. Nor can it be doubted that the defendant had a standing in the court after an appearance which would have authorized an appeal from that determination.

The case of *Windsor v. McVeigh*, 93 U. S. 274, is cited in Black on Judgments, section 226, with the comment that, "This doctrine derives some support from the cases holding that opportunity to be heard is absolutely essential to the

guaranty of 'due process of law.' Nevertheless, for the reasons stated in the beginning of this chapter, in defining 'jurisdiction,' we are not convinced that irregularities in the action of the court, even so gross as those mentioned, can properly be said to deprive it of all jurisdiction, and make its decision a mere nullity."

We think, however, that it may well be said that the action of the court in striking out the appearance of the defendant in the proceedings involved in *Windsor v. McVeigh*, 93 U. S. 274, was more than an irregularity, and amounted, in effect, to a nullification of the previous order of the court for a citation by notice—the only process by which the court could, in the absence of an appearance, have obtained jurisdiction. We see no reason to question the correctness of the holding in *Windsor v. McVeigh*, 93 U. S. 274. But we agree with the writer of the text that, jurisdiction having been obtained, any irregularity in the action of the court, however gross, does not render the decision a nullity.

In *Carolan v. Carolan*, 47 Ark. 511, it was held that the rendering of a judgment by a justice of the peace without proof, or the striking out of defendant's answer for want of verification, and refusing to let him defend for want of a verified answer, are not errors rendering the <sup>165</sup> judgment a nullity. The case of *Windsor v. McVeigh*, 93 U. S. 274, is cited by the court, and distinguished.

The judgment of the circuit court will be reversed, and a judgment entered in this court upon the findings in the sum of four thousand six hundred and thirty-nine dollars and twenty-three cents, with interest from the twenty-first day of June, 1893, and with costs of both courts.

The other justices concurred.

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**ACTIONS—EFFECT OF APPEARANCE TO WAIVE PROCESS.**—A nonresident who voluntarily appears and pleads to the merits of the case thereby waives service of the complaint on him: *Hausseman v. Burnham*, 59 Conn. 117; 21 Am. St. Rep. 74; or objection to the jurisdiction of the court: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135, and note; *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316, and note with the cases collected.

## LEESON v. ANDERSON.

[99 MICHIGAN, 247.]

**DEBTOR AND CREDITOR—PART PAYMENT AS DISCHARGE—TENDER.**—The acceptance by the holder of a note past due of a less sum than the face of the note, with an agreement to discharge the debt, does not operate to fully release the debtor, but is a payment *pro tanto* only, and the holder of the note need not, before bringing suit to recover the amount unpaid, tender the amount received, and thus repudiate such agreement.

**DEBTOR AND CREDITOR—PART PAYMENT AS DISCHARGE—RELEASE WITHOUT CONSIDERATION.**—A debtor, in paying a portion only of a debt, when he is bound to pay the whole, furnishes no consideration for a promise by the creditor to fully discharge him. Such payment is *pro tanto* only, and the creditor need not tender back the amount received, and thus repudiate the agreement before bringing suit for the amount remaining unpaid.

**DEBTOR AND CREDITOR—PART PAYMENT WHEN DISCHARGES DEBT.**—Part payment made in compromise of a claim over which there is an honest dispute, or by general composition with creditors, or if the payment is made in some thing other than money, under an agreement that such payment shall discharge the whole debt, is valid, and has that effect.

*Sawyer and Bishop*, for the appellant.

*Pratt and Davis*, for the appellee.

247 MONTGOMERY, J. This case presents the question of whether the acceptance by the holder of a promissory note past due of a less sum than the face of the note, with an agreement to discharge the debt, operates to release 248 fully the debtor. We are constrained to hold that it does not. The debtor, in paying a portion only of the debt, when he is bound to pay the whole, furnishes no consideration for a promise by the creditor to discharge him, and such payment is treated in law as a payment *pro tanto* only: See 2 Daniel on Negotiable Instruments, sec. 1289, and cases cited; see, also, *Harrison v. Close*, 2 Johns. 448; 3 Am. Dec. 444; *Ryan v. Ward*, 48 N. Y. 206; 8 Am. Rep. 539; *Bridge Co. v. Murphy*, 13 Kan. 40; *Smith v. Schulenberg*, 34 Wis. 47; *Wheeler v. Wheeler*, 11 Vt. 66; *Bailey v. Day*, 26 Me. 88; *Bright v. Coffman*, 15 Ind. 371; 77 Am. Dec. 96; *Headley v. Hackley*, 50 Mich. 44, 45. And see note to *Cumber v. Wane*, 1 Smith's Leading Cases, 8th Am. ed., 635, et seq. The result is different if payment is made in compromise of a claim over which there is an honest dispute, or by general composition with creditors, or if the payment be in some thing other than money.

It was contended in the present case that, before suit was brought for the portion remaining unpaid, the plaintiff should

have tendered back the amount received, and thus repudiated the settlement; and defendant's counsel cite *Pangborn v. Continental Ins. Co.*, 67 Mich. 683, as sustaining this contention. But in that case the plaintiff's only ground for setting aside the settlement was that it was effected by fraud. If there had been no fraud the settlement was admittedly valid, and effectual to discharge the debt. Such was also the case in *Jewett v. Petit*, 4 Mich. 508. The settlement, but for the alleged fraud, was good and valid, and it was held that the plaintiff was bound to rescind this transaction before he could treat it as a nullity. But such is not the case here. No fraud was practiced. The defendant has simply failed to pay the amount which he owed, and, under the authorities cited, this was payment *pro tanto*, leaving the remainder unpaid. The defendant, by paying a portion of his indebtedness, has not been induced to part with any money, which, by the <sup>249</sup> obligation of his contract, he was not bound to pay; and the payment which he has made is ineffectual to discharge wholly plaintiff's claim, because it was not sufficient in amount, and because the plaintiff's agreement to release the defendant was not upon any valid consideration, and hence the relations of the parties are the same as though such agreement had not been made.

We do not overlook the several objections to the proceedings which are taken by defendant's counsel, but there were findings of fact and law, and a general exception, which, with the error assigned upon such findings, is sufficient to raise the question of whether the findings support the judgment. The conclusion of law stated by the trial judge was that: "The parties had a right to compromise the debt, and that the plaintiff had a right to take less than the face of the claim upon condition of a payment of part of the same; and, if he did so, that was a sufficient consideration to make the compromise valid and binding."

This conclusion of law was necessary to support the judgment, and, being at variance with the views of this court, as herein expressed, it follows that the judgment below should be reversed, and a judgment entered in this court for the amount remaining due, three hundred and forty-nine dollars, with interest from December 9, 1892, together with the costs of both courts.

The other justices concurred.

**RELEASE.—WHEN ACCEPTANCE OF SUM LESS THAN DUE OPERATES TO DISCHARGE WHOLE DEBT:** See the extended note to *Jones v. Perkins*, 64 Am. Dec. 138, and the note to *Gates v. Steele*, 18 Am. St. Rep. 269; and see, further, the late cases of *Clark v. Abbott*, 53 Minn. 88; 39 Am. St. Rep. 577, and note; and *Bliss v. New York etc. R. R. Co.*, 160 Mass. 447; 39 Am. St. Rep. 504, and note.

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## **McCRAY REFRIGERATOR AND COLD STORAGE COMPANY v. WOODS.**

[99 MICHIGAN, 269.]

**SALES—WARRANTY—PAROL EVIDENCE OF.**—Under a written contract for the sale of a refrigerator, containing no warranty of its preserving qualities, parol evidence is not admissible to show that the vendor expressly warranted the apparatus to preserve meats for a certain time, and that it failed to do so.

**SALES—WARRANTY—PAROL EVIDENCE OF.**—Under a written contract of sale containing no warranty, parol evidence is not admissible to add one.

**WARRANTY—PAROL EVIDENCE OF.**—Warranties, whether express or implied, can issue only from the contract itself, and cannot depend upon extrinsic evidence, except as may be necessary for the explanation of some latent ambiguity.

**WARRANTIES.—PAROL EVIDENCE IS NOT ADMISSIBLE** to add to an unambiguous writing facts which may aid the implication of a warranty.

**WARRANTY—WHEN NOT IMPLIED.**—Under a written contract by a vendor to place a patent system of refrigeration in a refrigerator to be sold and furnished to the vendee, with nothing in the contract beyond the name of the system to show that it was any thing in the nature of a refrigerating process, or that it was designed or intended to preserve meats, or that the vendee had any thing to do with meats, no implied warranty exists that the system would preserve meats for any particular length of time, nor can such warranty be shown by parol evidence.

*T. C. Carpenter and A. Aksey*, for the appellant.

*C. A. Sturges and H. P. Stewart*, for the appellees.

269 **HOOKE, J.** Plaintiff's action is brought to recover the contract price of a patented apparatus for a refrigerator furnished to the defendants upon the following contract:

270 "This contract, made this 6th day of January, 1891, by and between McCray Refrigerator and Cold Storage Co., of Kendallville, Noble county, Indiana, of the first part, and Woods & Zent, of Sturgis, county of St. Joseph, state of Michigan, of the second part:

"*Witnesseth*, That, whereas, the party of the second part is desirous of adopting the McCray patent system of refrigeration in their 20 x 40 refrigerator: Now we, McCray Refriger-



ator Company, party of the first part, agree with the party of the second part, whose name or names are hereto attached, to furnish every thing requisite to the putting in of our patent in said 20 x 40 refrigerator, including lumber, racks, pans, rims, trough, filling material, labor, etc., etc., and, in short, every thing necessary to the completion of our patent in said refrigerator, for \$475 cash. Woods & Zent, party of the second part, agree to accept said patent, and pay \$475 cash. when party of the first part shall have completed above work and contract.

"It is hereby understood that the McCray Refrigerator Company will not be responsible for any promises made by their agents that are not made a part of this contract, and attached thereto, either printed or written.

"For a faithful and full performance of our respective parts of the above contract we bind our heirs, executors, administrators, and assigns.

"Executed in duplicate this 6th day of January, 1891.

"HOMER McCRAY,

"McCray Refrigerator and Cold Storage Co.,

"E. E. McCray, Sec. and Treas.,

"WOODS & ZENT.

"We also agree to furnish bill of lumber and plans for said building, and send man to superintend the building of same, at \$3 per day and board; also, agree to furnish deed for said building."

Upon the trial the defendants attempted to prove an express warranty that the apparatus would preserve fresh meats from thirty to fifty days, or for most any time desired, and that, upon repeated trials, it failed to do so.

The court was requested to charge the jury as follows: "The contract in this case is in writing, and I instruct you that any conversation had between the parties that tends to controvert or vary the terms of such agreement <sup>271</sup> before the signing of the contract is not admissible evidence. You should not consider any such conversation in this case."

On the contrary, the court instructed the jury as follows: "There was a written contract between the parties, and no parol evidence can change that agreement. All its stipulations are binding upon the parties to it. And I instruct you that any conversations had between the parties that tend to contradict or vary the items of such agreement before the signing of the contract cannot be considered by you as evi-

dence in the case. What this written contract says, to the extent which it goes, controls, beyond all parol evidence; that is, all talks and conversations. And it must be conclusively considered that all such conversations were merged in the writing, and that the agreement so written expresses the real contract between the parties; and, in making up your verdict, you must give full effect to the stipulations so written. The defendants, however, were permitted to offer proof upon the trial to the effect that the plaintiff, at the time of making the agreement, represented and warranted that the McCray system of refrigeration, which was proposed to be put in for defendants, would keep fresh meats thirty, forty, or fifty days. You will remember, gentlemen, that the plaintiff denies that any such warranty was given or representations made. The written contract is silent upon this question. And, gentlemen, I here instruct you, as requested by the counsel for the defendants, if the jury find from the evidence that the plaintiff represented to the defendants that the refrigerator would keep fresh meat thirty to fifty days, then I charge you that would be a warranty that this refrigerator would keep fresh meat thirty to fifty days; and, if you find from the evidence that the plaintiff had not given defendants such a cold storage as it agreed it would, it cannot recover. If you believe from the evidence that no such oral representation or warranty was in fact made then you should disregard all that has been testified to upon that subject, and confine yourselves to the stipulations of the written contract."

This instruction seems to be based upon the proposition that, inasmuch as the writing was silent upon the subject <sup>272</sup> of warranty, one might be proved by parol. This was error. The true rule is that a written contract cannot be varied or added to by parol. The addition of a warranty is as objectionable as any other. Mr. Parsons, in his work on Contracts (vol. 1, p. 547), uses this language: "A warranty in the sale of a chattel is an essential part of the bargain, and should be stated in the bought and sold notes."

In *Peltier v. Collins*, 3 Wend. 466, 20 Am. Dec. 711, Marcy, J., remarked, in giving the opinion of the court: "Suppose the contract had been with warranty, and the memorandum in the plaintiffs' sales-book had been signed by the defendant, but the warranty clause omitted, and suppose the rice had been delivered and had proved to be of an inferior quality, could the defendant have shown the warranty by parol?"

The authorities to which I have referred show most abundantly that he could not."

Again, the author says (1 Parsons on Contracts, 548): "It is clear that parol evidence of a warranty not mentioned in the writing is not admissible in a suit brought by the purchaser for damages for breach of warranty": Citing *Reed v. Wood*, 9 Vt. 285.

Mr. Parsons, on pages 589 and 590, again refers to the subject, saying: "And where the contract of sale is in writing, and contains no warranty, there parol evidence is not admissible to add a warranty"; saying in a note that "this was distinctly adjudged in *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529. It rests upon the familiar principle that the writing is supposed to contain all the contract."

The general rule is too well understood to require the citation of authorities. But see 17 Am. & Eng. Ency. of Law, 420, and note.

Some Michigan cases may be supposed to support the defendants' contention: *Phelps v. Whitaker*, 37 Mich. 72. This was an order for a windmill, signed only by the purchaser. The court said that the paper did not constitute <sup>273</sup> such a contract as would exclude evidence of the conversation when it was made.

*Trevidick v. Mumford*, 31 Mich. 469, holds that a deed and a bill of sale made by the plaintiff were not meant to contain all of the obligations of the defendant. This is familiar doctrine, the papers being mere incidents of the contract, and made to carry out some of its provisions: 1 Parsons on Contracts, 590.

*Richards v. Fuller*, 37 Mich. 161, was similar to the case of *Trevidick v. Mumford*, 31 Mich. 469, while *Weiden v. Woodruff*, 38 Mich. 131, was identical in principle with *Phelps v. Whitaker*, 37 Mich. 72, which it followed; as also was *Wood Mowing & Reaping Machine Co. v. Gaertner*, 55 Mich. 453. Many of the cases cited in the Michigan cases referred to involve fraud and deceit, of which parol evidence may always be given: See *Nichols v. Crandall*, 77 Mich. 401; *Rumely v. Emmons*, 85 Mich. 511; *National Cash Register Co. v. Blumenthal*, 85 Mich. 464.

In addition to the instruction given the court further instructed the jury upon the theory that there might be an implied warranty, as follows:

"Upon this question of warranty, I, however, instruct you

as requested by counsel for defendants: If you find from the evidence that the plaintiff knew that the defendants were butchers, and the plaintiff agreed by this contract to construct for them a cold storage to be used by them in their business, then the law raises an implied warranty that the cold storage was reasonably fit for the purpose for which it was constructed; in this case the purpose being to preserve meat. And if you find that the cold storage constructed by the plaintiff for the defendants was not reasonably fit for the purpose for which plaintiff knew defendants designed to use it then plaintiff cannot recover.

“And, further, as requested by defendants, I instruct you that if you find from the evidence that defendants purchased the cold storage system for a particular purpose, <sup>374</sup> made known to the plaintiff at the time of the purchase, and that defendants relied on the judgment and knowledge of the officer of the plaintiff, and not on their own, then there is an implied warranty that the system furnished should be reasonably fit and suitable for that particular purpose; and this is more obvious and true when the plaintiff was the manufacturer as well as the seller.

“The plaintiff claims that the McCray patent system is reasonably fit and suitable for aiding in the preservation of fresh meats and other perishable articles, and valuable for that purpose. It does not claim that it will preserve such articles any stated length of time, and denies that any such representations were made; and I instruct you, as requested by counsel for plaintiff, that the McCray letters patent for cold storage and refrigeration, and other letters patent and specifications granted them, is a good system for the preservation of perishable goods.

“If you believe, gentlemen, from the evidence, that the McCray patent system, as furnished the defendants, was not wholly worthless, but was of some value for the purpose designed, and that the plaintiff put it in the defendants' building substantially as agreed, then your verdict should be for the plaintiff for the contract price.”

The effect of these instructions, taken in connection with the first mentioned, was to permit the jury to find that there was no express warranty, but that there was an implied one, based on the very evidence relied on to show the express warranty; in effect holding that while parol evidence was admissible to show an express warranty, it might be received

to establish an implied one. Implied warranties are not unknown, and they are by no means limited to parol contracts. Thus, there is ordinarily an implied warranty of title where there is a contract of sale of personal property. Again: "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose." This principle, however, is limited to cases where a thing is ordered for a special purpose, and cannot be applied to cases where a special <sup>275</sup> thing is ordered, although it be intended for a special purpose: 1 Parsons on Contracts, 587. In Benjamin on Sales, section 661, it is said that: "If a man buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter*, if the buyer purchases on his own judgment."

But it is a rule of general application that warranties, whether express or implied, can only issue from the contract itself; and it must be a legal deduction, and cannot depend upon extrinsic evidence, except as it may be necessary for the explanation of some latent ambiguity: 10 Am. & Eng. Ency. of Law, 110, and note 1; *Ottawa etc. Flint Glass Co. v. Gunther*, 31 Fed. Rep. 208; *Scott v. Hix*, 2 Sneed, 192; 62 Am. Dec. 466, 467. Parol evidence is not admissible to add to an unambiguous writing facts which may aid the implication of a warranty: *Whitmore v. South Boston Iron Co.*, 2 Allen, 52, 58; *Johnson v. Cranage*, 45 Mich. 14.

In the present case the defendants contracted for the purchase and erection in their refrigerator of an apparatus patented by the plaintiff, and called the "McCray Patent System of Refrigeration." Beyond its name there is nothing to show that it was any thing in the nature of a refrigerating process. The contract does not show that it was designed to preserve meats, or that the defendants had any thing to do with meats. It does not appear what use it was intended for, or that the plaintiff had any information upon the subject. No warranty can be implied from this that it would preserve meat for any particular length of time. Defendants' own testimony showed that on one occasion, at least, the meat was in good condition at the end of six days after it was put in the refrigerator, from which it appears to be adapted to the purpose of refrigeration, which is the extent to which a war-

ranty can be <sup>276</sup> implied—if, indeed, it can go so far under this contract. It goes without saying that if the apparatus did not conform to the description, i. e., if it was not built according to the patent, or, by reason of defective materials or workmanship, was not merchantable, another question would arise. But the test of the plaintiff's undertaking is the contract as written, not with parol additions in the way of conversations and promises in regard to the efficiency of the apparatus.

The judgment will be reversed and a new trial ordered.

GRANT and MONTGOMERY, JJ., concurred with HOOKER, J.

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McGRATH, C. J., and LOVE, J., dissented, and maintained that the action of the trial court was proper in refusing to give the instruction requested, and in instructing the jury as it did. Mr. Chief Justice McGrath said: "There are authorities which go so far as to hold that whenever, upon the purchase or sale of an article, a bill of sale or sale note, or even a bill of parcels is given, such instrument is the evidence of the contract, and that parol evidence of a warranty, or of representations operating as an inducement to the purchaser, will not be admitted." Of such cases is *Lamb v. Crafts*, 12 Met. 353; *Mumford v. McPherson*, 1 Johns. 413; 3 Am. Dec. 339, and *Wilson v. Marsh*, 1 Johns. 503. But this rule has not been adopted by the supreme court of Michigan, and it has distinctly decided to the contrary: *Phelps v. Whitaker*, 37 Mich. 72; *Richards v. Fuller*, 37 Mich. 161; *Weiden v. Woodruff*, 38 Mich. 130; *Wood Mowing etc. Co. v. Gaertner*, 55 Mich. 453. "The cases of *Nicholds v. Grandall*, 77 Mich. 401, *Rumely v. Emmons*, 85 Mich. 511, and *National Cash Register Co. v. Blumenthal*, 85 Mich. 464, are clearly distinguishable from the present case. In the first the writing contained a specific warranty, and it was sought by parol to add a warranty as to the capacity of the machine. The *Rumely* case was similar, and it was sought also to show a verbal agreement that defendants would not be confined to the written warranty. In the last case defendant sought to show a contemporaneous verbal agreement to the effect that the vendee should receive the register on trial and return it if not satisfactory." When the written contract contains an express warranty and shows that the subject of warranty was in the minds of the parties, they should not be allowed to add to the instrument upon that subject by parol. But "in the present case the writing contains no warranty. The only description of the apparatus is contained in the figures denoting the size. The principal ingredient of the thing sold was a process or system. The defendants bargained with reference to the utility of that process. The figures used throw light upon that question, and cannot be said to have so defined the thing purchased as to exclude oral testimony as to representations concerning it." "The trial court correctly stated the law as to an implied warranty," as laid down in Benjamin on Sales, section 661, as follows: "If a man buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill and judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose, *aliter*, if the buyer purchases on his own judgment: *Morse v. Stock Yard Co.*, 21 Or. 289; *Flint Glass Co. v. Gunther*, 31 Fed. Rep. 208; *Bigelow v. Boxall*, 38 U. C. Q. B.

452; *Morehouse v. Comstock*, 42 Wis. 626; *Boothby v. Scales*, 27 Wis. 626; *Machine Works v. Chandler*, 56 Ind. 575; *Fox v. Agricultural Works*, 83 Cal. 333; *Chapin v. Dobson*, 78 N. Y. 74; 34 Am. Rep. 512. "The court was correct in the instruction that the statement as to the utility of the apparatus would constitute an express warranty, and that a warranty would be implied under the other circumstances stated. It was not necessary to state that the existence of the one excluded the other. The rule that no warranty is implied when the parties have expressed, in words or by acts, the warranty by which they mean to be bound, applies only when it is attempted to extend the warranty beyond the scope of that expressed."

**SALES—PAROL EVIDENCE TO ESTABLISH WARRANTY.**—In the absence of fraud, accident, or mistake it is incompetent to show a parol warranty of an agricultural implement sold by a written contract containing no warranty: *Mast v. Pearce*, 58 Iowa, 579; 43 Am. Rep. 125, and note; *Titley v. Enterprise Stove Co.*, 127 Ill. 457; and the same rule is held true in *Mumford v. McPherson*, 1 Johns. 413; 3 Am. Dec. 339, where the transaction was the sale of a ship; and, to the same effect, see *Smith v. Williams*, 1 Murph. 426; 4 Am. Dec. 564, the sale of a slave. This question is fully discussed in the monographic note to *Green v. Batson*, 5 Am. St. Rep. 197

**SALES.—IMPLIED WARRANTIES GENERALLY:** See the extended note to *Bragg v. Morrill*, 24 Am. Rep. 104, and the notes to *Fairbank Canning Co. v. Metzger*, 16 Am. St. Rep. 758; *Mores v. Moore*, 23 Am. St. Rep. 794; *Blackwood v. Cutting Packing Co.*, 9 Am. St. Rep. 206, and *Grieb v. Cole*, 1 Am. St. Rep. 537. A warranty that a chattel is fit for a particular use is ordinarily implied when it is sold for such a use: *Beale v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150, and note; *Best v. Flint*, 58 Vt. 543; 56 Am. Rep. 570; *Sinclair v. Hathaway*, 57 Mich. 60; 58 Am. Rep. 327. In case of an executory contract for the manufacture of articles to be delivered at a future day, there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed: *Woodle v. Whitney*, 23 Wis. 55; 99 Am. Dec. 102, and note; *Poland v. Miller*, 95 Ind. 387; 48 Am. Rep. 730; *Snow v. Schomacker Mfg. Co.*, 69 Ala. 111; 44 Am. Rep. 509, and note; *Pease v. Sabin*, 38 Vt. 432; 91 Am. Dec. 364, and note; *Rodgers v. Niles*, 11 Ohio St. 48; 78 Am. Dec. 290, and note.

## ATTORNEY GENERAL v. JOCHIM.

[99 MICHIGAN, 358.]

**OFFICERS.**—PUBLIC OFFICE IS NOT PROPERTY within the meaning of constitutional provisions providing that no person shall be deprived of life, liberty, or property without due process of law.

**OFFICERS.**—PUBLIC OFFICES ARE DELEGATIONS OF PORTIONS OF SOVEREIGN POWER for the welfare of the people. They are not the subject of contracts, but are agencies for the state, revocable at pleasure by the authority creating them, unless such authority is limited by the power which conferred it.

**OFFICERS.**—APPOINTMENT OR ELECTION TO PUBLIC OFFICE does not establish contract relations between the person appointed or elected and the public.



**OFFICERS—REMOVAL OF.**—The legislature may remove public officers, not only by abolishing the office, but by act declaring it vacant, and may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations.

**OFFICERS.—REMOVAL FROM PUBLIC OFFICE** is not a deprivation of the officer of property, even if the removal must be for cause, upon specific charges, and after an opportunity to be heard.

**OFFICERS—OFFICE TAKEN SUBJECT TO WHAT CONDITIONS.**—Statutory offices are taken subject to legislative action as to removal, and constitutional offices are taken subject to constitutional provisions and changes; both classes of offices are taken upon the terms, and subject to the conditions existing by law.

**OFFICERS—REMOVAL.**—A constitutional state officer takes office subject to an existing constitutional provision that he may be removed by the governor for specified reasons, and the governor may so remove him without a trial by jury, and the intervention of the constitutional judiciary.

**CONSTITUTIONAL LAW.—DUE PROCESS OF LAW** means the law of the land, by which is to be understood laws general in their operation, and not special laws passed to affect the rights of particular individuals against their will, and in a way in which the same rights of other persons are not affected by existing laws.

**CONSTITUTIONAL LAW.—DUE PROCESS OF LAW** is not necessarily judicial process. Administrative process, regarded as necessary in government, and sanctioned by long usage, is as much due process as any other.

**CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—A constitutional requirement that a person cannot be deprived of his property without due process of law does not imply that all trials in state courts affecting property must be by jury.

**CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—The state is not so bound by the term "due process of law" that it is impossible for it to invest its agents with its offices without subjecting itself, so far as their removal is concerned, to the delays and uncertainties of strict judicial action, and it may, in cases of emergency, summarily remove them if permitted by the state constitution.

**CONSTITUTIONAL LAW—REMOVAL FROM OFFICE BY GOVERNOR.**—When the state constitution invests the governor with power to remove certain constitutional state officers for gross neglect of official duty, it is the duty of the governor, upon discovering such neglect, to remove them after notice to them of the charge, and an opportunity to be heard, and although his action is in a sense judicial, it is no valid objection thereto that he acts both as accuser and judge.

**CONSTITUTIONAL LAW—REMOVAL FROM OFFICE BY GOVERNOR—GROSS NEGLIGENCE OF OFFICIAL DUTY.**—When the constitution makes it the duty of the secretary of state, as a member of a board of state canvassers, to canvass returns and certify the result of elections, it is gross neglect of official duty on his part to fail to perform such official duty, and to permit an erroneous canvass by clerks or deputies, and, although such erroneous canvass is not permitted intentionally or willfully, it is the duty of the governor, upon discovering such neglect, to remove such officer from office when he is invested with such power under the state constitution.

**CONSTITUTIONAL LAW—PROCESS.**—A constitutional provision that the style of all process shall be "in the name of the people of the state" applies only to the judicial, and not to the executive department.

**CONSTITUTIONAL LAW—REMOVAL FROM OFFICE.**—Citation by the governor to state officers to appear before him and show cause why they should not be removed from office is not such an official act as needs authentication, within the meaning of a constitutional provision requiring that "all official acts of the governor, his approval of the laws excepted, shall be authenticated by the great seal of the state," especially when he is citing the custodian of the great seal before him upon charges of official misconduct.

*A. A. Ellis, attorney general, Geer and Williams, and Cahill and Ostrander, for the relator.*

*Smith, Lee, and Day, and John Atkinson, and F. A. Baker, for the respondent.*

201 HOOKER, J. By constitution (art. 8, sec. 4) and by statute (Howell's Stats., sec. 202) the board of state canvassers is made to consist of the secretary of state, state treasurer, and commissioner of the state land-office. It is the duty of this board to canvass the returns from the various counties of the state, and declare the result of elections for state officers and upon constitutional amendments. At the spring election in the year 1898 four amendments to the constitution were voted upon by the electors of the state, one of which provided for an increase of the salaries of several of the state officers, including the secretary of state and the commissioner of the state land-office. These amendments were, by the board of canvassers, declared carried. Subsequently the returns were recanvassed 202 by the board, in obedience to a writ of *mandamus* issued by this court, when it was found and declared that the amendment relating to salaries was defeated. Proceedings were then taken by the governor, which culminated in an order by him removing each of said officers from his office, and declaring the same vacant; and, respondents refusing to surrender their respective offices, informations in the nature of *quo warranto* were filed in the name of the attorney general, upon relation of the governor, to try their right to such offices. This is the proceeding against the secretary of state.

The questions in the case are raised by the replication and the demurrer of respondent thereto. In answer to the plea, which asserts respondent's election and accession to the office of secretary of state, the replication sets up in detail the facts upon which the relator's claim is based, viz: That relator was the duly elected and acting governor of this state; that, as such, it became and was his duty, under section 8 of article

12 of the constitution, to inquire into the condition and administration of the office of secretary of state, and the manner in which respondent performed the duties of such office, for the purpose of determining whether said respondent had been guilty of gross neglect of duty in relation to his duties as a member of the board of state canvassers, and to remove respondent from said office for gross neglect of duty if he should be found guilty thereof; that a charge of that kind having come to the knowledge of the relator he caused written notice to be served upon the respondent, which notice required him to appear before the relator, and show cause why he should not be removed from his office of secretary of state for gross neglect of duty in connection with the canvass of the returns in relation to said amendment relating to salaries of state officers, such notice containing specific charges of neglect, as follows:

363 "EXECUTIVE OFFICE,

"LANSING, February 6, 1894.

"To John W. Jochim, Secretary of State, Joseph F. Hambitzer, State Treasurer, and John G. Berry, Commissioner of the State Land-office, Composing the Board of State Canvassers,

"GENTLEMEN: Public charges have been made, and have come to my knowledge, that gross errors were made in the canvass of the returns of votes given in the various counties at the election held in this state on the first Monday in April, A. D. 1893, for and against the adoption of Joint Resolution No. 10, approved March 9, 1893, entitled 'Joint Resolution proposing an amendment to section one (1), article nine (9), of the constitution of this state, relative to the salaries of state officers,' by which it was made to appear that such amendment to the constitution had been ratified and approved by a majority of the electors voting thereon, whereas it is alleged that, by a true and correct canvass of the returns of such votes, the said amendment was defeated. Under the power granted and duty imposed upon me, as governor of this state, by section eight (8) of article (12) of the constitution, it became necessary to inquire into the administration and condition of your several offices, and especially into the manner in which you have, severally and collectively, performed the duties of the board of state canvassers, of which you are *ex officio* members, for the purpose of determining whether you have been guilty of gross neglect of duty in the matter of canvassing the said returns.

**"You are therefore severally cited and required to appear before me, at the executive office in the city of Lansing, on the 15th day of February, 1894, at 1 o'clock in the afternoon, then and there to answer to the following specific charges, viz:**

**"1. That you, the said John W. Jochim, secretary of state, Joseph F. Hambitzer, state treasurer, and John G. Berry, commissioner of the state land-office, who are the board of state canvassers under the constitution and laws of this state, were, each and every one of you, guilty of gross neglect of duty, in this: That you did not, nor did either of you, examine the statements or returns of votes from the several counties, filed in the office of the secretary of state, showing the number of votes cast for and against said proposed amendment to the constitution relative to the salaries of state officers, by the electors in this state at the election in April, 1893.**

**"2. That you were severally guilty of gross neglect of duty, in this: That you did not, nor did either of you, ascertain and determine the result of such vote, nor perform with due and proper care the duties relating to canvassing the statements and returns from the several counties of the votes given at such election for and against said proposed amendment to the constitution, required <sup>264</sup> of and imposed upon you, as members of the said board of state canvassers, by the constitution and laws of this state.**

**"3. That you were severally guilty of gross neglect of duty, in this: That you made, and suffered to be made, gross errors in the canvass of the statements and returns filed in the office of the secretary of state of the votes given in the several counties at said election in April, 1893, for and against said proposed amendment to the constitution, by which it was falsely made to appear that such proposed amendment had been approved and ratified by a majority of the electors voting thereon, whereas, by a true and correct canvass of the said statements and returns, the said proposed amendment was defeated.**

**"4. You are further required, then and there, to show cause why you, and each of you, should not be removed from office for gross neglect of duty.**

**"JOHN T. RICH, Governor."**

The replication further alleges that the respondent appeared by counsel before relator, and moved to vacate the notice and dismiss the charges, for reasons following:

**"1. The governor has no power, under section 8 of article**

12, or any other provision of the constitution, to remove the respondents, or either of them, from their respective offices, for any misconduct on their part, or on the part of either of them, as members of the board of state canvassers.

"2. The power of the governor, under section 8, article 12, of the constitution, is confined to the official misconduct of the officers therein named, in the performance of the duties appertaining to each of said officers, separately and severally considered; and it does not include such duties as are performed by such officers, jointly with others, as members of constitutional or statutory bodies or boards.

"3. The house of representatives, under sections 1, 2, and 3, article 12, of the constitution, has the sole power to direct an impeachment of these respondents for misconduct in the performance of their duties when acting as a board of state canvassers, and the senate has exclusive jurisdiction to try any such impeachment.

"4. The charges set forth in the notice served upon these respondents are wholly insufficient and fatally defective, for the reason that it is not alleged therein that the neglect of these respondents, or any of them, was intentional, or that they, or either of them, have knowingly and designedly neglected any official duty, or that they, or either of them, have neglected to perform any duty with an evil intent, or for any improper, illegal, or culpable purpose.

365 "5. The charges contained in said notice do not make or state a case of gross neglect of duty, within the meaning of section 8, article 12, of the constitution; and the governor, sitting as a court of impeachment, has no jurisdiction or power to render judgment of removal thereon.

"6. The notice served on respondents is void, because it is not 'in the name of the people of the state of Michigan,' as required by section 35 of article 6 of the constitution, and it is not authenticated by the great seal of the state, as required by section 18 of article 5 of the constitution.

"7. The board of state canvassers is created by the constitution of this state, and, in the performance of their duties and functions, the members of said board, in the absence of conduct on their part amounting to a criminal offense, are not subject to the control or interference of the governor of the state, or of any other branch or department of the government; and, excepting the power of the legislature to determine any case where the decision of the state board of

canvassers is contested, they are answerable or amenable only to the people of the state, by whom they were elected to their respective offices."

It is further alleged that the motion was denied; that evidence was introduced in support of the information, as follows:

1. The returns from the several counties showing the vote upon said amendment.

2. The canvass of said returns, purporting to have been made and signed by respondent and the other members of the board of state canvassers upon May 16, 1893, from which it appears that the said amendment was carried by a majority of eighteen hundred and twenty-one votes.

3. The canvass of said returns subsequently made by said officers, under the order of the supreme court, showing the defeat of said amendment by eleven thousand four hundred and fifty-five votes.

4. Vouchers showing the amounts paid to respondent and the other members of said board for their expenses in making said canvasses.

5. A stipulation by counsel that a short time prior to May 16, 1893, respondent was notified by his clerks that a tabulated statement showing the votes for and against said amendment had been prepared, and was ready to be signed by the members of the state board of canvassers; that thereupon respondent notified the other members of said board by telegram, in response to which they came to Lansing, and signed said tabulated statement prepared by ~~see~~ their clerks; that neither of them compared or examined the returns from any county, nor did they compare them with the tabulated statement aforesaid; that they relied upon what their clerks stated about such statement being correct, and, believing it to be so, signed it; and that was all that they had to do with it.

The replication further states that no evidence was offered upon the part of respondent; that an order adjudging respondent guilty, and removing him from his said office, was thereupon made, and duly served upon said respondent upon the nineteenth day of February, 1894. As stated, a demurrer to this replication was filed.

The important questions presented by this record are, 1. The power of the governor to remove respondent; 2. The sufficiency of the cause alleged. The jurisdiction of this court to review or pass upon the official acts of a co-ordinate branch

of government was not discussed. It was referred to in the brief of counsel for the relator, with an express disavowal of a desire to raise the question. We shall therefore omit a discussion of that subject.

Whatever authority the governor has to remove respondent must be found in section 8 of article 12 of the constitution, which reads as follows: "The governor shall have power, and it shall be his duty, except at such time as the legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance therein, either of the following state officers, to wit: The attorney general, state treasurer, commissioner of land-office, secretary of state, auditor general, superintendent of public instruction, or members of the state board of education, or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired term of office, and report the causes of such removal to the legislature at its next session."

<sup>267</sup> It is contended that this section is in violation of the amendment of the constitution of the United States which provides that no state shall "deprive any person of life, liberty, or property without due process of law": U. S. Const., amend. 14, sec. 1. As the constitution of this state contains the same provision (art. 6, sec. 32), no new right was conferred upon officeholders, nor was any modification of the power of the governor to remove officers under section 8 of article 12, consequent upon the adoption of the fourteenth amendment. Any question that can now be raised upon the latter could have been raised under the former at any time since section 8 of article 12 was adopted; and all decisions upon section 32 of article 6 are applicable to this provision of the fourteenth amendment, unless in contravention of federal decisions thereon. To sustain this point it must appear: 1. That the removal from office is a deprivation of the respondent of his property; and 2. That it was sought to be accomplished without due process of law.

A public office cannot be called "property," within the meaning of these constitutional provisions. If it could be it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office



until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contracts, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. In the case of *City of Wyandotte v. Drennon*, 46 Mich. 480, Mr. Justice Cooley, in giving the opinion of the court, said:

"It is claimed, however, that, when the salary is fixed at the time when the office is accepted, the acceptance is presumed to have the salary in view, and a contract is thereby effected between the officer and the city, which neither can change without the consent of the other. This is a position that has frequently been taken, and almost as often overruled. Nothing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public. The leading case of *Butler v. Pennsylvania*, 10 How. 402, has been universally regarded as having settled that question, and it has been followed by decisions in numerous cases. The salary or other compensation is therefore at the discretion of the legislative authority of the state, or of such other authority as the legislature has seen fit to intrust it to. This was indirectly recognized in *Chapoton v. Detroit*, 38 Mich. 636, a case which is in point here.

"It is said on behalf of the defendant in error that the principle above stated rests on the right of the officer to resign and give up his office at any time; and it is further said this right did not exist in the case of this officer, because he could only resign to the common council—the very body that reduced the salary—and the council might keep him in by refusing to accept his resignation. Whether the council could in this way compel the recorder to continue in the performance of his duties we do not care to consider in this case, because we think the legislative authority over the subject does not depend upon the existence or nonexistence of any such power. Offices are created for the public good, at the will of the legislative power, with such powers, privileges, and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But, except as it may be restrained by the constitution, the legislature has the same inherent authority to modify or abolish

that it has to create; and it will exercise it with the like considerations in view. Whoever accepts a public office must accept it with this principle of constitutional law in view; and, if his compensation is reduced below what seems to him reasonable, it may be a hardship, but it is not a legal wrong. The legislative power is ample, and he is supposed to know when he takes the office that it is liable to be exercised."

The legislature may remove officers, not only by abolishing the office, but by an act declaring it vacant, as was done by act No. 140, section 13, Laws of 1891: *Throop v. Langdon*, 40 Mich. 673; *Auditors v. Benoit*, 20 Mich. 184; 4 Am. Rep. 382. And it may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations. And, while it cannot remove incumbents of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates. The constitutional officer is an agent of government. There is the same lack of the ingredients of contract, and the same power to abolish the office or remove the officer by amendment of the constitution: *City Council v. Sweeney*, 44 Ga. 463; 9 Am. Rep. 172; *Butler v. Pennsylvania*, 10 How. 402.

The fact that some cases hold that removals from office cannot, in some instances, be made, except upon cause shown, upon notice, specific charges, and after a hearing in its nature judicial, does not militate against this doctrine. These cases simply hold that removals are limited by the power of the people or legislature, through the constitution or statute; not that a vested property right is involved in the holding of office, or that removal is beyond the power which creates the office and the officer. Nor does it follow that removal from office is a deprivation of the officer of property, because it must be for cause, upon specific charges, and after an opportunity to be heard. Many cases may be found that speak of the disgrace of removals, and the right to hold an office under election. Of these the case of *Page v. Hardin*, 8 B. Mon. 672, perhaps, goes the furthest.

The case of *Dullam v. Willson*, 53 Mich. 393, 51 Am. Rep. 128, discusses section 8 of article 12, holding that it was not designed to confer upon the governor power to remove without charges and hearing; but it recognizes the power of the people over public offices, and sustains the authority of the governor, under this section, to remove for cause. Mr.

Justice Champlin says: "That under the amendment the governor was vested with the power of determining whether the specified causes exist, appears to me too plain for serious contradiction. I fully concur in the views expressed upon this point by the learned counsel for the respondent (Judge Christiancy), wherein he says: 'It was competent, by constitutional amendment, to authorize him to exercise such judicial power. And while this amendment gives the power of removal only for the causes which it specifies (which, though similar in character, are not identical with those specified in the statute), and the question of the officer's guilt is one judicial in its nature, yet the amendment imposes a duty and confers upon the governor the power "to examine into the condition and administration of the office and public acts of the officers" to which it applies, and to remove them from office for the causes there enumerated; thus, in effect, giving him the right to try the question whether the officer is guilty or not, and to remove him from his office.' The counsel for the respondent, while granting this, insist that such removal cannot be made without charges, notice, and an opportunity for defense, and this I consider the important question in the case. Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte* as well as summary, a removal without charges, notice, and an opportunity for defense cannot be upheld."

Again, as all statutory offices are taken subject to legislative action, so all constitutional offices are taken subject to constitutional changes, and both are upon the terms and subject to the conditions existing by law. One of the constitutional conditions upon which the respondent took his office was that he would be subject to removal by the governor, under article 12, section 8: *Frey v. Michie*, 68 Mich. 328; *Fuller v. Attorney General*, 98 Mich. 96.

But conceding, for the argument, that the office is a vested property right, what is the "due process of law" to which the respondent is entitled, under the constitutions <sup>371</sup> of this state and the United States? Counsel contend that it can mean nothing less than a trial by the constitutional judiciary, and perhaps a jury. If so, it must be because the constitutional office differs from the statutory office, as several cases hold that removals from the latter may be made without the intervention of courts: *Dullam v. Willson*, 53 Mich. 392; 51 Am. Rep. 128; *People v. Stuart*, 74 Mich. 415; 16 Am.

St. Rep. 644; *Wellman v. Board of Police*, 84 Mich. 558, 91 Mich. 427; *Fuller v. Attorney General*, 98 Mich. 96. But this language of the constitution means less than that. The words "due process of law," as used in the constitution (art. 6, sec. 32), mean the law of the land, by which are to be understood laws which are general in their operation, and not special acts of legislation passed to affect the rights of particular individuals against their will, and in a way in which the same rights of other persons are not affected by existing laws: *Sears v. Cottrell*, 5 Mich. 251. Due process is not necessarily judicial process. Administrative process, which has been regarded as necessary in government, and sanctioned by long usage, is as much due process as any other: *Weimer v. Bunbury*, 30 Mich. 201. In this case the treasurer of the city of Niles did not collect and pay over to the county treasurer certain taxes, whereupon, in accordance with the statute, the county treasurer issued a warrant to the sheriff, commanding him to levy and collect the amount from the property of the city treasurer. It was held not to invade article 6, section 32.

The federal decisions also qualify the claim of respondent's counsel. In *Ex parte Wall*, 107 U. S. 265, it is said that what is due process of law in the state is regulated by the law of the state. The requirement of the constitution that a person cannot be deprived of his property without due process of law does not imply that all trials in the state courts affecting property must be by jury.

372 "Due process of law does not require a plenary suit and a trial by jury in all cases where property or personal rights are involved. . . . It is, in all cases, that kind of procedure which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts": See, also, *New York etc. R. R. Co. v. Town of Bristol*, 151 U. S. 556.

In *Den v. Hoboken etc. Imp. Co.*, 18 How. 272, Curtis, J., says: "For, though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true."

This case, by an exhaustive review of English and American authorities, vindicates summary methods on the part of the government to obtain its due from a tax collector, analogous to the proceedings in the case of *Weimer v. Bunbury*, 30

Mich. 201. Certainly the resort to similar proceedings by the government to reclaim its offices may be equally necessary and justifiable. In a discussion of this subject in the case of *Davidson v. New Orleans*, 96 U. S. 103, Mr. Justice Miller said:

“The history of the English mode of dealing with public debtors, and enforcing its revenue laws, is reviewed [referring to *Den v. Hoboken etc. Imp. Co.*, 18 How. 272], with the result of showing that the rights of the crown, in these cases, had always been enforced by summary remedies, without the aid of the usual course of judicial proceedings, though the latter were resorted to in the exchequer court when the officers of the government deemed it advisable. And it was held that such a course was ‘due process of law,’ within the meaning of that phrase, as derived from our ancestors, and found in our constitution.

“It is not a little remarkable that while this provision has been in the constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the <sup>273</sup> manner in which the powers of that government have been exercised has been watched with jealousy, and subject to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded”: See, also, *Springer v. United States*, 102 U. S. 586; *Hilton v. Merritt*, 110 U. S. 97, 107; *Campbell v. Holt*, 115 U. S. 620; *Railway Co. v. Humes*, 115 U. S. 512;

*Provident Institution v. Jersey City*, 118 U. S. 506; *Garrison v. City of New York*, 21 Wall. 196.

From these authorities it appears that the state is not so bound by the term "due process of law," in the constitutions, that it is impossible for it to invest its agents with its offices without subjecting itself to the delays and uncertainties of strict judicial action in cases of emergency. While in many cases (and, under the decision in the case of *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, perhaps in this) the power of removal is a limited and restricted one, to be exercised along given lines and with prescribed formalities, as already stated, it is not by reason of an inherent right of property in the officer, bringing him within the protection of the fourteenth amendment, but because of the limitations of the law. The Michigan cases already cited settle <sup>374</sup> for this state the authority of the governor, under the constitution.

It is said, however, that the governor, in this case, made his own charges and employed his own counsel, and is therefore to sit as judge in his own case. One of the duties of the governor, under section 8, article 12, is to investigate the state offices. He is given inquisitorial power, that he may ascertain their condition, for the public welfare. No other means is provided for acquiring the necessary information. If he discovers irregularities of particular character it is his duty to remove the officer, and supply his place by appointment, reporting his action to the legislature at the next session. *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, is authority for the proposition that the incumbent is entitled to notice of the charge, and an opportunity to be heard in his defense. This necessarily implies that the governor's action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the governor; that the complainant must procure counsel; or that the governor is necessarily interested, and thereby disqualified from hearing and determining, because he performs the other duties which are specifically imposed upon him by this section of the constitution. It is no uncommon thing for judges to order arrests and prosecution for acts committed in their presence, such as contempts, perjury, and perhaps other offenses, and they are not thereby disqualified. There is nothing in the record to show any interest upon the part of the governor, further than to ascertain the condition of the office, and to act upon the informa-

tion obtained as the constitution requires. It is the duty of the governor to investigate, using all lawful means to go to the bottom of any real or supposed irregularity. To that end he may use clerks and expert accountants, if necessary; and it is fair to presume that <sup>375</sup> the state would recognize the expenses as legitimate obligations. The law does not require a complainant nor prevent the governor from committing the interests of the state to competent lawyers, official or otherwise. Finally, the governor acts judicially upon the accumulated evidence and such explanations, by way of defense, as the respondent may offer. In this respect his action is similar to that discussed in *Fuller v. Attorney General*, 98 Mich. 96, which discussion it is unnecessary to repeat.

We come next to the charges. It is contended that they are insufficient, because the act is not alleged to have been intentional, and because it was not gross neglect to permit an erroneous canvass by clerks; further, that the act was not within the provision of section 8, because it was an act done by the respondent as a member of the board of canvassers, and not as secretary of state, and that the only remedy was by impeachment by the legislature. To these is impliedly added, and strenuously argued, that the legislature could not impeach for gross neglect, and that, therefore, the governor could not remove for such neglect. It is true that, before the defalcation of the state treasurer in 1860, the governor could not remove a constitutional officer, and that a defaulting treasurer had the lawful authority to continue to receive the public funds until the legislature should convene, and proceed by impeachment to secure his removal. Doubtless this condition of affairs, as counsel assert, led to the adoption of the amendment of 1862, viz., article 12, section 8. It is also true that section 1 of article 12 gives to the legislature the sole power to impeach civil officers for corrupt conduct in office, or for crimes and misdemeanors. If no further power of impeachment existed than as mentioned in section 1 it must be conceded to follow that the governor was granted a broader power of removal than the legislature had by way of impeachment. But the people had <sup>376</sup> the undoubted power to authorize removals by the governor for causes not theretofore mentioned as a ground for impeachment. They certainly made it his duty to remove for gross neglect, and we cannot accept the proposition that the amendment was not intended to include that which it especially mentions in terms unmis-



takeable to the common understanding. Nor do we think there is any merit in the point that the duty of canvassing the returns is not the official duty of the secretary of state. By virtue of his office he is one of three who constitute a board. Without his office he could not act, and we think the part performed by him is an official act of the secretary of state.

It remains to discuss the character of the charges made. The only duties of the board of state canvassers are to canvass the returns, and determine and certify the result of elections. Theirs is the culminating act of the army of persons who have had to do with the receiving and counting, recording, and transmitting of the votes which signify the will of the people. Section 202 of Howell's Statutes makes it the duty of these officers to attend, and form the board of state canvassers. Their duties are specifically pointed out. The times when they are to meet are provided by law. No provision is made for deputies or clerks, but all go to show that this important duty is to be performed by them in person, as the certificate signed by them asserts. It is not confided to inferior officials, but to three of the state officers of greatest dignity and importance. It appears to have been the design of the law-makers to place the votes of the people in the keeping of the most responsible officers of the state; and no argument ought to be necessary to show that it was not expected that the returns would, upon their arrival, be turned over to an irresponsible clerk in the secretary's office, having no official relation to the canvass, whose <sup>277</sup> tabulation should be the canvass, and that the mere signing of their three names to his production should constitute a full compliance on the part of these officers with the law prescribing the duties of the state canvassers. Section 207 requires an examination by the board of the several statements of the votes, and that they make a statement of the whole number of votes cast for each office, while section 209 makes it their duty to certify such statement to be correct. A mere failure to certify could be called "neglect." What shall be said of it when the certificate is made without knowledge of, or any attempt to ascertain, the fact? An officer is elected for two years. Who shall count and keep the money of the state, or keep its great seal for a couple of years, is not a matter of vital importance; but an amendment of the constitution changes, perhaps for all time, the fundamental law, releasing or reclaiming by the

people some right or power over the legislature and officers, the consequence of which may be stupendous. In the present instance it was a matter of money—several thousand dollars a year; and, while many may feel that the defeat of this amendment was unfortunate, it is vastly more unfortunate to have the will of the people thwarted, though it be the result of carelessness only, or neglect on the part of the board to perform the only duty imposed upon them by law. Looking at the circumstances from his official standpoint the governor may well have said this, though not willful, was only possible by reason of the grossest neglect of official duty. It certainly was some one's duty to move at once with a view to the correction of the error, and the prevention of its recurrence.

While there is an inclination upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices shall be confided to, or remain in the custody of, those whose duties and responsibilities <sup>278</sup> rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive, upon whom is placed, by this amendment, the responsibility of keeping the affairs of state in a proper condition. We cannot think that the term "gross neglect" means only intentional official wrongdoing. Such acts would hardly be described by the word "neglect."

It is said that this section confides great power to the governor. This is true; but the governorship is an exalted office—one which ought to carry with it a presumption of integrity of character and breadth of mind commensurate to its importance. It would be a sad commentary upon free government if it were otherwise. But the powers of the governor are carefully restricted, and there is no occasion to pursue the illusive phantoms of possibility. When abuses arise they will doubtless be speedily and effectively met.

It remains to notice the sixth objection raised. It is as follows: "The notice served on respondents is void because it is not 'in the name of the people of the state of Michigan,' as required by section 35 of article 6 of the constitution, and it

is not authenticated by the great seal of the state, as required by section 18 of article 5 of the constitution."

It is enough to say that section 35 of article 6 applies to the judicial department only, while the other provision (art. 5, sec. 18), certainly ought not to apply to a case where the governor is citing the custodian of the great seal before him upon charges. But such citation is not such an official act as needs authentication. It has no importance, <sup>379</sup> and is of no personal interest to others than those cited, and falls within the multitude of daily acts, which, while official in a sense, do not require authentication by the great seal.

The demurrer must be overruled, and judgment of ouster entered against the respondent.

The other justices concurred.

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**OFFICERS—REMOVAL.—BY WHAT AUTHORITY MAY BE EXERCISED:** See *Trimble v. People*, 19 Col. 187; *ante*, p. 236; and *People v. Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644, and note.

**PUBLIC OFFICE—WHAT IS.**—An office is the right to exercise a public function or employment: *Hamlin v. Kansafer*, 15 Or. 456; 3 Am. St. Rep. 176, and note. A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer: *State v. Stanley*, 66 N. C. 59; 8 Am. Rep. 488. An office is a continuing charge or employment, whose duties are defined by law and not by contract, and the person filling it is an officer: *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169, and extended note.

**OFFICERS—POWER OF LEGISLATURE OVER.**—Where an office is created entirely by an act of the legislature the legislature may, in the absence of a constitutional restriction upon its power in the special case, shorten the term or abolish the office altogether, as it may think the public interests require: *State v. Douglass*, 26 Wis. 428; 7 Am. Rep. 87, and note. A public office is the property of the incumbent, subject, however, to legislative control in all that concerns the interest of the community, and the legislature may therefore increase the duties, diminish the emoluments, or even abolish the office: *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677, and extended note.

**DUE PROCESS OF LAW—WHAT IS.**—Due process of law, or due course of law, or law of the land, is such an exercise of the powers of government as the settled maxims of the law permit and sanction and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs: *Wulzen v. Board of Supervisors*, 101 Cal. 15; 40 Am. St. Rep. 17, and note. "Due process of law," or "law of the land," means general public law, binding upon all members of the community, under all circumstances, and not partial and private laws affecting the rights of private individuals or classes of individuals: *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206.

## HITCHCOCK v. GRIFFIN AND SKELLEY COMPANY.

[30 MICHIGAN, 427.]

**PRINCIPAL AND AGENT—RATIFICATION OF AGENT'S CONTRACT.**—A fruit broker, not authorized to make binding contracts, but only to take orders subject to acceptance, and who is only paid commissions on approved sales, is the agent of the vendor, and one who orders fruit through such agent has a right to rely on the supposition that his order will be honestly transmitted, the goods shipped according to its conditions, and the principal by accepting the order ratifies the contract as made by such agent.

**SALES—RESCISSIION—RESALE BY VENDOR ON ACCOUNT OF VENDOR.**—One who orders perishable fruit through an agent, and is required to accept a draft for the purchase price before delivery or inspection of the fruit, and on inspection notifies both the agent and the vendor of his rejection of the fruit at the price agreed upon for failure of warranty of quality, may, after waiting a reasonable time and receiving no answer, either from the agent or the vendor, sell the fruit for the vendor's account and charge him with the loss.

**BROKERS—ACTS OF WHEN BINDING ON PRINCIPAL.**—A broker may bind his principal by a sale by sample and with warranty when that is according to the usual and customary mode of sale.

*G. W. Bates*, for the appellant.

*Bowen, Douglas, and Whiting*, for the appellee.

448 **HOOKEE, J.** Kean & Co., the assignors of the plaintiff, being wholesale dealers in fruit, ordered, through one Blodgett, a carload of oranges from the defendant, which was a similar dealer in California. The oranges arrived at Toledo, and Kean & Co. were required to accept a draft for the price before receiving or being allowed to inspect them, this acceptance being subsequently paid. The fruit proving unsatisfactory this action was brought upon the contract for damages, and plaintiff recovered.

Two questions arise in the case: 1. The authority of Blodgett to bind defendant by his agreements, including ratification; 2. The measure of damages.

Blodgett resided in Toledo. It is claimed that he was not an employee of the defendant in the ordinary sense of the term, but was termed a "broker." His method of doing business was to obtain orders for oranges from local firms, and send them to defendant, which furnished him with quotations, subject to its acceptance. If accepted he received a commission upon the sale from defendant.

The plaintiff introduced evidence tending to show that 449 the firm of Kean & Co. knew Blodgett, a merchandise broker in Toledo; that on March 13, 1891, they bought of Mr. Blod-

gett a carload of seedling oranges, to be shipped by defendant, the same to be first class. This fruit was received, and was satisfactory. One of the firm testified further:

"The next transaction with Mr. Blodgett [i. e., the one in controversy] was about April 6th or 7th following. He solicited our trade.

"Q. State fully the conversation you had with Mr. Blodgett at that time. A. Mr. Blodgett came into our store, as he usually does, three or four times a day, with a dispatch or quotation in his hands, and asked me if we did not want to buy a car of California oranges, and I told him, if he could sell us another car just like the previous car, we would take them. He agreed to do so, and the order was given to him in that way. . . . That the oranges were to be Riverside seedling fruit, identically the same as the first car from the Griffin & Skelley Co. I was very particular in giving the order. I wanted the second car to be the same as the first—what we would call fancy fruit."

On finding that the fruit was unsatisfactory Kean & Co. saw Blodgett, and told him it was not the kind of an orange they had bought, and that it was not any thing like the first car. The witness further testified that they had on hand some of the oranges of the first car when the second car came in; that he compared them, and showed them to Blodgett; told him to notify Griffin & Skelley Co. that the car was not satisfactory. "First, I told him we would sell the oranges for their account; but we had already paid the freight—nearly three hundred dollars. A few days afterwards I asked him if he had heard from Griffin & Skelley Co., and he said 'No.' As he did not hear from them, I wrote them a letter myself." The following <sup>450</sup> is a copy of the letter, which was offered and read in evidence:

"TOLEDO, April 20, 1891.

"*Griffin & Skelley Co., Riverside, Cal.,*

"GENTLEMEN: The car of oranges billed us on the 8th just received. They do not compare with the first car we got from you, nor are they satisfactory in any way. A number of parties we sold them to have returned them to us. We have called your agent, Mr. Blodgett's, attention to it. We prefer not to have the oranges, and will not be satisfied with less than 50 cents a box reduction. You had better wire Mr. Blodgett at once.

Yours,

"E. M. KEAN & Co."

They had no reply from Mr. Blodgett as to what disposition to make of the oranges, or from the Griffin & Skelley Co. "Blodgett told me he had telegraphed to them. Then I sold them to the trade for the best price I could get. Soon after they arrived I put my traveling man on the road to sell them, and it took about thirty days to close them out from the time of their arrival." The net amount received was three hundred and eighty-four dollars and seventy-one cents.

The following letter, received by Kean & Co. from Blodgett, was introduced:

"RIVERSIDE, CAL., March 13, 1891.

"*Albro Blodgett, Toledo, Ohio,*

"DEAR SIR: Your T. D. received this morning as follows: 'Sold Kean (E. M. Kean & Co.) duplicate of Toledo car; proclaim harmless; ship Toledo duplicate other car April 1. Will pay for first car before April 1. Answer.'"

On cross-examination witness said that, by the agreement with Blodgett, the oranges were to be delivered f. o. b. at Riverside, California. The following telegram from Blodgett was introduced:

451 "TOLEDO, OHIO, April 7, 10:33 A. M.

"*Griffin & Skelley Co., Riverside, California.*

"April 7, 1891. Kean 100 boxes, 200 size; 75 boxes, 176 size; 50 boxes, 146 size; 25 boxes, 128 size; 50 boxes, 226 size; \$2. Follow assortment as nearly as possible."

This telegram was followed by letter:

"TOLEDO, April 8, 1891.

"*Griffin & Skelley Co., Riverside, California,*

"GENTLEMEN: I beg to confirm sale, and wired you yesterday and to-day. E. M. Kean & Co. one car, and Toledo Fruit Co. one car, Riverside seedlings, at \$2 f. o. b."

The foregoing, with some evidence taken under objection, tending to show the condition of the fruit when it arrived in Toledo some twelve days after it was billed, constituted the substance of the plaintiff's testimony.

The defendant introduced evidence in regard to the relation of Blodgett to the corporation. It was, in substance, that the defendant employed no agents, but dealt through a large number of brokers, who took and sent it orders, subject to approval; that the trade so understood it. Blodgett received a commission upon approved sales.

The court instructed the jury that: "If the jury find that Blodgett did not telegraph the Griffin & Skelley Co. all the

particulars of the arrangement with Kean & Co., the contract made by him with Kean & Co. was not binding on defendant, and your verdict shall be for the defendant."

A review of the evidence convinces us that, in the law, this alleged broker was no more or less than an agent of the defendant. He was not authorized to make binding contracts, as brokers usually do, but could take orders subject to approval; in that respect following the common custom of itinerant salesmen. He was paid a commission by the defendant for approved sales. The purchasers had a right to suppose that their offer would be honestly <sup>452</sup> transmitted, and that the goods were shipped according to its conditions, and, by accepting the order, the defendant ratified the contract as made by the agent: *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Pa. St. 398; 27 Am. St. Rep. 638. In this case it is said:

"The whole doctrine was well expressed by Sharswood, J., in the case of *Mundorff v. Wickersham*, 68 Pa. St. 87, 8 Am. Rep. 531: 'If an agent obtains possession of the property of another by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: "*Qui sentit commodum sentire debet et onus.*" The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself, and reject the remainder; he must take the benefit to be derived from the transaction *cum onere.*'

"This doctrine is so reasonable, and so entirely just and right in every aspect in which it may be considered, and it has been enforced by the courts with such frequency and in such a great variety of circumstances, that its legal soundness cannot for a moment be called in question. It is of no avail to raise or discuss the question of the means of proof of the agent's authority. The very essence of the rule is that the agent had no authority to make the representation, condition, or stipulation by means of which he obtained the property or right of action of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the prin-



principal is bound, but notwithstanding the fact that he had no such authority. It is the enjoyment of the fruits of the agent's action which charges the principal with responsibility for his act. It is useless, therefore, to inquire whether there is the same degree of technical proof of the authority of the agent in the matter under consideration as is required in ordinary cases, where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to ~~453~~ impose a legal liability upon another person; and, in all that class of cases, it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony the legal consequence is established."

It is the everyday practice to apply this rule to accepted orders for merchandise, on the familiar principle that a principal is bound by the representations of his agent when acting within the scope of his authority which his principal has permitted him to appear to possess: *Mecham on Agency*, secs. 279-281, and cases cited. Even if *Blodgett* were a broker in the strictest sense it is not clear that he could not bind his principal by a sale by sample and with warranty, especially if it was according to the usual and customary mode of sale: *Forcheimer v. Stewart*, 65 Iowa, 600; *Heyn v. O'Hagen*, 60 Mich. 150; *Andrews v. Kneeland*, 6 Cow. 354; *Story on Agency*, secs. 59, 60, 109; *Boorman v. Jenkins*, 12 Wend. 566; 27 Am. Dec. 158; *Waring v. Mason*, 18 Wend. 425; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; 59 Am. Dec. 163; *The Monte Allegre*, 9 Wheat. 644; *Helyear v. Hawke*, 5 Esp. 72; *Gibson v. Colt*, 7 Johns. 390; 1 *Parsons on Contracts*, 60; *Wharton on Agency*, sec. 710. *Contra*, *Dodd v. Farlow*, 11 Allen, 426; 87 Am. Dec. 726. And see *Brady v. Todd*, 9 Com. B., N. S., 592; *Smith v. Tracy*, 36 N. Y. 79. But this is not a case arising upon an attempt to hold the vendor to a contract made by a broker. The defendant has accepted the order, and received its pay, and now seeks to vary the terms of the order by calling the agent a broker, and questioning his authority. We think the trial court committed no error in leaving these questions to the jury.

It is further contended that the sale by *Kean & Co.*, with-

out notice, was an acceptance of the fruit in fulfillment of the contract. The evidence showed a notice to the agent and a letter to defendant, both of which were <sup>454</sup> disregarded. Kean & Co. had paid three hundred dollars freight, and had obligated themselves to pay for the goods by reason of the acceptance before an opportunity was given them to see the oranges. The court instructed the jury that if defendant never received any notice of a rejection by Kean & Co., or that Kean & Co. would sell the same for its benefit, Kean & Co. had no right to charge defendant with any loss incurred in the sale of the oranges. Blodgett had been notified, and said he would wire defendant, and the evidence shows that defendant was not disposed to take any notice of Kean & Co's complaint. Under such circumstances they could do no less than sell the fruit. It was perishable fruit, and to have done less could not be justified.

Judgment affirmed.

The other justices concurred.

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**AGENCY—RATIFICATION OF UNAUTHORIZED ACTS BY ADOPTION OF.**—Accepting and retaining the benefits of an unauthorized contract of an agent, with knowledge of the circumstances, constitutes a ratification of the contract: *Gulick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728; *Taylor v. Conner*, 41 Miss. 722; 97 Am. Dec. 419, and note; *Szymanski v. Plassan*, 20 La. Ann. 90; 96 Am. Dec. 382; *Eastman v. Provident etc. Relief Assn.*, 65 N. H. 176; 28 Am. St. Rep. 29; *Town of Grafton v. Follansbee*, 16 N. H. 450; 41 Am. Dec. 736; *Dispatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; 37 Am. Dec. 203. See, also, the extended note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 110, and the notes to *St. Louis etc. Ry. Co. v. Bennett*, 22 Am. St. Rep. 190, and *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 29 Am. St. Rep. 96.

**SALES BY AGENTS—WARRANTY—CUSTOM.**—A purchaser of machinery may recover from the seller for a breach of warranty by the agent of the latter upon proof of a general custom amongst agents selling such machinery to warrant it: *Larson v. Aultman*, 86 Wis. 281; 39 Am. St. Rep. 893. A general agent employed to carry on a business with power to sell also has power to warrant, if it is usual to give a warranty when making a sale in such business: *Edwards v. Dillon*, 147 Ill. 14; 37 Am. St. Rep. 199, and note.

**SALES—RESCISSIONS—RESALE BY VENDOR.**—One who rescinds a contract of sale for fraud practiced on him, and offers to return to the vendor the property purchased, is not obliged on refusal of the vendor to receive the property to keep it until the end of the controversy. He may either retain the property as agent of the vendor, or, after notice to him, may in good faith sell it on his account: *Hambrick v. Wilkins*, 65 Miss. 18; 7 Am. St. Rep. 631.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI**

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**ST. LOUIS v. HOWARD.**

[119 MISSOURI, 41.]

**STATUTES, INTERPRETATION OF.**—Statutes must be construed with reference to the whole system of which they form a part. Therefore, statutes, even on cognate subjects, may be referred to, though not strictly *in pari materia*, in order to elucidate the intention of the legislature in enacting any given statute.

**MUNICIPAL CORPORATIONS, SLAUGHTER-HOUSES.**—A statute authorizing a city to provide for the erection, management, and regulation of slaughter-houses empowers it to forbid the operation of such houses within designated limits, except under certain specified conditions.

**A MUNICIPAL ORDINANCE REQUIRING THE CONSENT OF CERTAIN INDIVIDUALS** to the exercise of a specified business is void, though the municipality had power to regulate such business. Hence, an ordinance is invalid which purports to make it unlawful to operate a slaughter-house within a distance of two hundred feet of any dwelling-house without the consent of the owner and occupant of every such house.

*T. J. Rowe*, for the appellant.

*W. C. Marshall*, for the respondent.

**43 SHERWOOD, J** In order to determine whether the motion filed to quash the information was properly denied requires a recital and examination of certain provisions of the city charter which have been brought to our attention. Paragraph 6 of section 26, pages 322, 323, of the charter empowers the city: 'To regulate stone quarries and quarrying of stone, and the slaughtering of animals; provide for the erection, management, and regulation of slaughter-houses; prevent the driving of stock through the city; prohibit the erection of soap factories, stockyards and slaughter-houses, pigpens, cow-stables

and dairies, coal oil and vitriol factories within prescribed limits, and to remove and regulate the same; and to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health, or the manufacture <sup>44</sup> or vending of articles obnoxious to the health of the inhabitants; and to declare, prevent, and abate nuisances on public or private property and the causes thereof."

Paragraph 14 of the same section and article of the charter, pages 326, 327, also empowers the city as follows: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines and penalties not exceeding five hundred dollars, and by forfeitures not exceeding one thousand dollars."

Section 34 of the same article, page 328, declares that: "No stone quarry shall be opened, or brick-kiln located, or soap factory, slaughter-house, bone or rendering factory erected within the distance of three hundred feet of any dwelling-house built and inhabited before such opening, location, or erection, without the consent in writing of the owner and of the occupant of every such house. The assembly shall provide, by ordinance, for the effectual enforcement of this section."

The investigation before us also requires the recital and discussion of two sections of the Revised Ordinances of 1887, the one on which defendant was fined, and the one next preceding it. These sections are as follows:

"SEC. 372. Hereafter no stone quarry shall be opened, or brick-kiln located, or soap factory, slaughter-house, bone or rendering factory erected within the distance of three hundred feet of any dwelling-house, built and inhabited before such opening, location, or erection, without first having obtained permission so to do from the municipal assembly by proper ordinance. Any person, company of persons, firm, or corporation <sup>45</sup> violating any or either of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars.

"SEC. 373. It shall not be lawful for any person, company of persons, firm, or corporation to work a stone quarry or operate a brick-kiln, or carry on a soap factory, slaughter-

house, bone or rendering factory, opened, located, or erected after the passage of this article, within the distance of three hundred feet of any dwelling-house built and inhabited before such opening, location, or erection, without the consent in writing of the owner and occupant or occupants of every such house; any person, company of persons, firm, or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars for each and every day such stone quarry, brick-kiln, soap factory, slaughter-house, bone or rendering factory is worked, operated, or carried on without such consent": Revised Ordinances, 1887, p. 583.

These sections being placed in juxtaposition, and being *in pari materia*, are to be treated as if embodied in one section; because statutes must be construed with reference to the whole system of which they form a part, and therefore statutes even on cognate subjects may be referred to, though not strictly *in pari materia*, in order to elucidate the intention of the legislature in enacting any given statute: Sutherland on Statutory Construction, secs. 283, 284, and cases cited.

Under paragraph 6 of section 26 of article 3 of the charter before quoted the city has the power "to . . . provide for the erection, management, and regulation of slaughter-houses." And section 34 of the same article is *in pari materia* with the former subsection of section 26 of the same article, because it prohibits <sup>46</sup> any "slaughter-house" from being "erected within a distance of three hundred feet of any dwelling-house, etc., without the consent in writing of the owner," etc., and then charges the assembly to "provide by ordinance for the effectual enforcement of this section."

The policy of the city concerning the operation or erection of slaughter-houses is thus clearly outlined in the sections of the charter already set forth.

But the objection is made that section 34 of article 3 of the city charter confers no power on the city to pass ordinance section 373, prohibiting the operation of a slaughter-house. While this is true of section 34 aforesaid, it does not hold good as to paragraph 6 of section 26 of the same article, for that subsection does confer such power as readily appears by reference to the standards of our language: Thus, "management" means administration, control, etc., and one of the synonyms of management is government. The last word

means control, and that means power or authority to check or restrain.

Regulation means a rule or order prescribed for management or government: Webster's Dictionary. So that paragraph 6 of section 26 of article 3 of the charter empowers the city (by ordinance, of course, for that is the only way the city can legislate) to prescribe rules whereby slaughter-houses may be erected or operated, or whereby such erection or operation may be checked or restrained either partially or *in toto*. This power is coextensive with the boundaries of the city, and has no limitations but those contained in the charter itself, except that such charter is subordinate to the constitution and laws of this state.

But notwithstanding the city has plenary powers in this regard, it has not seen fit to exercise them by passing an ordinance making it a misdemeanor to carry <sup>47</sup> on or operate a slaughter-house "without first having obtained permission so to do from the municipal assembly by proper ordinance." And, doubtless, it might be provided in such ordinance that, as a condition precedent to its passage, the consent in writing of the owner or owners of adjacent house or houses should first be obtained. The ordinance would have the force of law, no matter what were its prescribed prerequisites. But, without such ordinance, the case stands here in precisely the same position as did *St. Louis v. Russell*, 116 Mo. 248, and consequently the same principle applies.

Adhering to the ruling in that case, section 373 must be held invalid, because of attempting to substitute for the sanction of a law the written consent of one or more individuals.

Therefore, judgment reversed and defendant discharged.  
All concur.

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**STATUTES—CONSTRUCTION—CONTEMPORANEOUS LEGISLATION.**—A statute is not to be separated from the body of the law of which it forms a part, but is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes: *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and note, with the cases deciding this point collected.

**STATUTES IN PARI MATERIA—CONSTRUCTION.**—Acts *in pari materia* should be construed together as if they were one law: *McCartee v. Orphan Asylum Soc.*, 9 Cow. 437; 18 Am. Dec. 516; *Harrison v. State*, 22 Md. 468; 85 Am. Dec. 658, and note; *Scarborough v. Watkins*, 9 B. Mon. 540; 50 Am. Dec. 528, and note; *Dugan v. Gittings*, 3 Gill, 138; 43 Am. Dec. 306, and note; *State v. Baltimore etc. R. R. Co.*, 12 Gill & J. 399; 38 Am. Dec. 317, and note; *State v. Wilbor*, 1 R. L. 199; 36 Am. Dec. 245.

A MUNICIPAL CORPORATION HAS NO POWER TO MAKE THE RIGHT OF A PERSON TO FOLLOW HIS BUSINESS at any place he may select dependent upon the will of any number of citizens or property owners within its limits: *Ex parte Sing Lee*, 96 Cal. 354; 31 Am. St. Rep. 218, and note.

MUNICIPAL CORPORATIONS—REGULATION OF SLAUGHTER-HOUSES.—A city may prohibit the slaughtering of animals within its limits, or may restrict it to designated localities and prohibit it in others, provided it leaves all persons equally free to slaughter animals in that quarter, and to furnish and rent places where the animals are slaughtered: *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196. A power conferred upon a city to "regulate the erection, use, and continuance of slaughter-houses" within the city includes the power of total prohibition in certain specified limits: *Cronis v. People*, 82 N. Y. 318; 37 Am. Rep. 564. To the same effect see *Milwaukee v. Gross*, 21 Wis. 241; 91 Am. Dec. 472.

## STATE v. GIDEON.

[119 MISSOURI, 94.]

CRIMINAL LAW, RULE OF COURT LIMITING RIGHT TO WITNESSES.—A rule of court declaring the number of witnesses for which parties in criminal prosecutions shall be entitled to have subpoenas issued as of course, and that parties desiring subpoenas for a greater number shall apply to the court by motion, supported by affidavit, setting forth the names of the witnesses desired, what facts they are expected to testify to, that the same are believed to be true, that the same are material to the issues involved or which may arise in the case, setting out fully the facts wherein its materiality consists, and that the facts desired to be established by such witnesses cannot be established by witnesses for whom subpoenas have issued as of course, and, if required by the court, shall further set out what the witnesses for whom subpoenas have issued as of course will testify to, is void, because in conflict with the bill of rights guaranteeing "in criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, and to have process to compel the attendance of witnesses in his behalf, and with the provision of the state statutes declaring that every person indicted and prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process of witnesses in his behalf.

RULES OF COURT in contravention of the organic or statute law of the state are to that extent void.

*Harrington and Pepperdine*, for the relator.

94 GANTT, P. J. The petition in this case, on which the alternative writ of *mandamus* was granted, states substantially the following facts: That the relator stood indicted in the Christian county circuit court, charged with the crime of murder in the first degree; that his trial was set for the second day of the August term of said court, 1893, he having been indicted at the previous February term, and his cause continued for want of time to try the same; that the relator,



some days before his case was set for trial, and before the <sup>25</sup> beginning of said term of court, in order that he might prepare himself to make his defense, went to the respondent's office, respondent being the clerk of said Christian county circuit court, and requested and demanded of him in writing that he issue a subpoena containing the names of twenty-eight persons, witnesses for relator who stood indicted as aforesaid; that all of said witnesses live in Christian county and within the jurisdiction of said court; that they are all competent to testify, and that the testimony of each was material and necessary to relator's defense; that said subpoena should be made returnable on the day on which relator's case was set for trial; that respondent, on a list of the names of said witnesses being furnished him, did, as clerk, issue a subpoena containing the names of the first fifteen persons named, but failed and refused to issue a subpoena containing the names of the twenty-eight persons desired as witnesses, or a subpoena containing the names of more than fifteen persons, whereupon, after filing an affidavit with the clerk, that said witnesses were material, and according to section 4406 of the Revised Statutes of 1889 the relator, being without remedy, resorted to this court and procured an alternative writ of *mandamus* commanding the said clerk to issue a subpoena containing the names of the other thirteen persons contained in said list, or to show cause, etc.

The respondent in his return to said alternative writ, after reciting that the process of said Christian county circuit court for witnesses in criminal cases had been in the past abused, entailing large expense to the state and county, justifies his action in refusing to issue said subpoena by a rule of said court made and entered into at the February term, 1893, thereof, which said rule or order is in the following language, and the legality and validity of which are the only questions <sup>26</sup> involved in this proceeding:

“Now at this day the court adopts the following rule to govern process in criminal cases. Parties in criminal cases, both plaintiff and defendant, shall be entitled to subpoenas for witnesses as of right, and ‘as of course’ as follows: In cases of a misdemeanor to the number of five subpoenas, and no more. In cases of felony, other than those punishable by death, to the number of nine, and no more. In cases that may be punishable by death, to the number of fifteen, and no more. The parties desiring subpoenas for a greater number

than those specified shall apply to the court by motion, or the judge thereof in vacation, supported by affidavit, setting forth fully the names of witnesses desired, what facts such witnesses are expected to testify to; that the same is believed to be true by the parties so applying; that the same is material to the issues involved, or may arise in the case setting out fully the facts, wherein its materiality consists, and showing to the court or judge therein the facts desired to be established by such witnesses or witness cannot be established by the witnesses for which the subpoenas are allowed 'as of course,' and if required by the court or the judge in vacation shall set out fully what the witnesses for which subpoenas have been allowed 'as of course' shall testify to."

Relator upon this return moves for a peremptory writ of *mandamus*. By the constitution of this state and statutes passed in pursuance of its mandate the most ample provision is made for securing to every person charged with crime subpoenas and compulsory process, to compel the attendance of witnesses in his behalf.

Thus, section 22 of article 2, or "Bill of Rights," provides: "In criminal prosecutions the accused shall have <sup>97</sup> the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

And section 4144 of the Revised Statutes of 1889 provides: "Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas, and compulsory process of witnesses in his behalf," etc.

Section 4406 provides further: "The defendant shall be entitled to process for witness to be issued and directed to the sheriff of the county in which such witness may be; but all the witnesses in the same county shall be included in one subpoena, and no subsequent subpoena shall be issued for any witness unless the court in which the case is pending or the judge or justice shall, for good cause shown, order a subpoena for another witness; or if, in absence of the judge, the defendant shall file with the clerk his affidavit that other witnesses ordered by him are material and positively necessary in his behalf to a full and competent adjudication of the case, the clerk shall issue subpoenas for such witnesses."

And to meet the evil at which the rule under consideration

is aimed, section 4420 was enacted as follows: "The judge and prosecuting attorney shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact, nor with costs of witnesses unnecessarily summoned, and not examined, but the costs of such surplus or unnecessary witnesses shall, in the discretion of the court, be taxed against the parties or attorney causing them to be summoned."

It is inherent in every court to make all needful rules for the orderly disposition of the business that may come before it, but, under our system of government, it is not within the duty or power of the court to make rules in contravention of either the organic or statute law of the state: 4 Am. & Eng. Ency. of Law, 450, note 7, and authorities cited.

It has been uniformly held by this court that if a rule of court went beyond or contradicted a statute of the state it would not be enforced here: *Colhoun v. Crawford*, 50 Mo. 458; *Purcell v. Hannibal etc. R. R. Co.*, 50 Mo. 504.

And where two were jointly indicted and tried, but were represented by different counsel, and a rule of court forbade more than one counsel on either side to examine witnesses, and counsel for one of defendants desired to question a witness as to a matter he deemed material, but which the other counsel deemed injurious to his client, and the court refused to permit the question, it was held that it was not in the power of a court to adopt a rule which would deprive a defendant in a criminal case of the right of cross-examination: *State v. Bryant*, 55 Mo. 75; see, also, *Huff v. Shepard*, 58 Mo. 242; *State v. Underwood*, 75 Mo. 230.

It will be observed that the constitution imposes no limit upon the number of witnesses a defendant may have summoned. The statute regulates this right only to the extent that it requires an affidavit that the witnesses are material and necessary when the defendant asks for a second subpoena. The rule in question, however, arbitrarily determines beforehand that the defendant in a capital case shall have fifteen witnesses, and no more.

To obtain other witnesses the defendant is required to file a motion before the court or judge, setting forth fully the names of the witnesses desired, what facts such witnesses are expected to testify to, that their evidence is material to the issue involved, and wherein it is material, and that the facts cannot be established by the witnesses for which subpoenas have been issued "as of course."

the appellate court declared that as the party applying for the judgment by default was entitled to the same by the rules of law, the court had no authority "to deprive the citizen by its rules of his legal rights. The judge must conform to the law though he should think that thereby certain citizens would be injured, or that its provisions do not exactly come up to a proper administration of justice. If the citizens desire relief by the alteration of the law for the administration of justice they must apply to the law-making power and not to the judiciary": *State v. Poesy*, 17 La. Ann. 252; 37 Am. Dec. 525. If the statute allowing suits to be commenced by declaration prescribes, as an incident of such suits, that the defendant shall have twenty days in which to plead, the court cannot by rule require his plea to be filed within a shorter time, although it is by statute given authority to adopt rules "in respect to the times for pleading and serving notices of trial and other notices." The power thus conferred to adopt rules respecting the times for pleading must be understood as applying only to those cases in which the legislature has not itself acted upon the subject: *Wyandotte Co. v. Robinson*, 34 Mich. 428. If a statute gives a litigant the right to three judicial days within which to apply for a rehearing, this right cannot be limited by a rule of court requiring applications for rehearings to be made on the same day that decisions are rendered: *State v. Fifth Circuit Judges*, 37 La. Ann. 596. If the code provides that a party may demur and answer at the same time, he cannot be deprived of his right by a rule of court, and hence his answer filed with his demurrer cannot be struck out because upon the overruling of the demurrer he did not pay "the sum of twenty dollars, costs, provided by a rule of the court to be paid in such cases": *People v. McClellan*, 31 Cal. 101. The same principle which inhibits courts from enforcing rules in conflict with statutes prohibits them from making and enforcing rules inconsistent with the rules of the higher courts, to which it is their duty to yield obedience: *Story v. Livingston*, 13 Pet. 359; *Gaines v. Relf*, 15 Pet. 9; *Bein v. Heath*, 12 How. 168; *Jenkins v. Greenwald*, 1 Bond. 126. So it is clear, whether any statute directly controls the subject or not, that a litigant cannot by rule of court be deprived of a substantial right, or so embarrassed in its exercise that he may be deprived without his fault of its benefit. The principal case is one of the best illustrations and applications of this rule. A rule of court limiting the examination of witnesses to one counsel on either side cannot be enforced where there are two or more defendants having separate defenses, and it is manifest that to deprive the counsel of either of the right to examine or cross-examine a witness would be equivalent to depriving his client of the benefit of counsel. It is "not in the power of any court to adopt any rule which would deprive the defendant in a criminal case of the right of cross-examination": *State v. Bryant*, 55 Mo. 75. So a court cannot obtain jurisdiction over a party from the fact that he makes a well-founded objection to its entertaining such jurisdiction. Therefore, a rule of court declaring that "application to the court to raise any jurisdictional question shall be deemed an appearance, and no further process shall be necessary to bring the party into court," is void, and the issuing and service of summons, which on motion is quashed, the defendant appearing specially for the purpose of making such motion, cannot entitle the court thereafter to proceed to render judgment against him: *Haff v. Shepard*, 58 Mo. 242. If a statute imposes certain conditions, and apparently gives some litigant a right upon compliance therewith, it is not in the power of the court by rule to impose further and more onerous conditions. Thus, if a statute gives the defendant the right of arbitration, and imposes no condi-

tion except that he cannot take his rule during the week at which his cause is set for trial, or within thirty days before the term, the court cannot enter judgment by default where such right to arbitration has been claimed, because defendant has not filed an affidavit of merits required by a rule of such court: *Hickernell v. First Nat. Bank*, 62 Pa. St. 146.

In *Considering the Effect of Rules of Court*, we wish it to be understood that our remarks apply only to those rules that the court had authority to adopt. A rule beyond the power of the court, like a statute which the legislature had not authority under the constitution to enact, is, in so far as it transcends the authority of the court, of no effect whatever. Rules adopted by a court without exceeding the limits of its authority are often spoken of as having the effect of rules enacted by the legislature, and, therefore, as being obligatory both on the court and on the parties: *Seymour v. Phillips etc. Co.*, 7 Biss. 460; *Lancaster v. Waukegan etc. Ry. Co.*, 132 Ill. 492; *Hanson v. McCue*, 43 Cal. 178; *David v. Etna Ins. Co.*, 9 Iowa, 45; *Walker v. Ducros*, 18 La. Ann. 703. This is certainly true in so far as the parties and their counsel have acted upon them, and sought to preserve and protect their rights in compliance therewith. The court cannot adopt a different rule, and apply it retroactively to their prejudice, nor treat them as in default if they have conducted themselves as required by the rules of the court, doing the acts required by them to be done, within the time and in the manner therein specified: *Maloney v. Hunt*, 29 Mo. App. 379; *Consolidated etc. Ry. Co. v. O'Neill*, 25 Ill. App. 313. Rules must be considered as operating prospectively only, and should the court assume to enact and enforce a rule applying to past transactions, and taking away rights to which before the adoption of the rule the parties, or any of them, were entitled, such rule must be disregarded as void: *Reist v. Heilbrenner*, 11 Serg. & R. 131; *Dewey v. Humphrey*, 5 Pick. 187. On the other hand, in so far as the rule is an expression of the legislative power of the court, it is an expression of a legislative power which, whenever the court is in session, it is competent to again exercise, by the repeal or modification of any of its rules, and thereby to a certain extent to withdraw any given case from their operation. There is, indeed, a conflict of judicial authority respecting the power of a court, while it leaves its rules unrepealed and unmodified, to except a single case from them, or to refuse to apply them, as to it shall from time to time seem best. Thus, the statement has been made by the very highest authority that rules of court are but the means to accomplish the ends of justice, "and it is always in the power of the court to suspend its own rule, and except a particular case from its operation, whenever the purposes of justice require it": *Sullivan v. Wallace*, 73 Cal. 307, 310; *United States v. Breitling*, 20 How. 254; *Pickett v. Wallace*, 54 Cal. 148. Therefore, the action of the court in suspending the following rules has been sustained: A rule requiring the transcript on appeal to be filed within a time designated therein: *Pickett v. Wallace*, 54 Cal. 148. A rule requiring copies of all *ex parte* orders to be served on the attorney of the adverse party: *Sullivan v. Wallace*, 73 Cal. 307. In several cases it has been held that a court may suspend its own rules so as to exclude a particular case from their operation: *United States v. Breitling*, 20 How. 252; *Russell v. McLellan*, 3 Wood. & M. 157; *Wallace v. Clark*, 3 Wood. & M. 359; or may disregard the fact that a litigant has failed to comply with such rules, whether previously suspended or not: *Sheldon v. Risedorph*, 23 Minn. 518. The practice upon this subject prevailing in some of the states was thus stated by the supreme court of judicature of New Hampshire:

"The rules of the court, by which is intended the general rules, it is said, and perhaps not improperly, are the law of the court. But such rules have material differences from the statute laws. Like the statutes, they constitute the rules of decision and the test of right as to every thing done while they continue in force, and the rights of parties as to every thing done under the rules in force are determined by those rules. But as the court had originally the power to make special rules, as the exigencies of each case might require, and as such special rules might be modifications of former rules, even to the extent of their entire revocation, so the courts have still, notwithstanding their general rules, the power to make special rules in each case; though they may have the effect to exempt a particular case from the operation of the ordinary general rule. In this respect the practice here is, and always has been, different from that adopted in Massachusetts (*Thompson v. Hatch*, 3 Pick. 512), where it was held that a plea in abatement cannot be filed after the first four days of the term by any special order of the court. The court here have always extended the time of pleading in abatement, in cases where justice seemed to require it, and the application is made before the expiration of the four days, as, for example, where the writ is improperly withheld from the defendant. The practice here seems consistent with the theory of the law, that the court may make such orders in each case, from time to time, as justice may require. A general rule in its application to any particular case, being neither more or less than a special rule to the same effect": *Deming v. Foster*, 42 N. H. 165.

We do not know whether the practice of the courts in respect to uniformity in the enforcement of their rules differs as widely as do their utterances upon the subject or not. As we have shown, the practice in many of the states is to enforce the rules of the court or not as to the presiding judge shall seem proper. In other courts, and perhaps even in the same court, in which this irregular practice has sometimes prevailed, there have been utterances of the most radical character from which the inference is deducible that to apply a rule in one case and to disregard or suspend it in another, equally within its letter and spirit, is not merely an unseemly favoritism, but an abuse of judicial authority not to be tolerated. Thus, where a rule of an appellate court had limited the time within which petitions for a rehearing might be filed, and it was sought to have the court disregard the rule, because, though the petition had not been filed in due time, it had been prepared and forwarded for filing, and from some unknown cause had not been forwarded by the express company to which it had been intrusted for that purpose, the court said: "The filing of a petition for a rehearing is not a matter of right. It is a privilege given by the court, governed and limited entirely by its rules. The power to make these rules is given and controlled by statute. The court, equally with the suitor, is bound by them until they are abrogated. We can conceive of no case in which the time for filing a petition for review can be enlarged, or a failure to file excused under the positive prohibitions of the rule": *Hanson v. McCue*, 43 Cal. 179; *Coyote etc. M. Co. v. Ruble*, 9 Or. 121; *Arata v. Tellurium etc. Co.*, 65 Cal. 340. A rule of court having provided that pleas in abatement might be filed within the first four days of the term, and not afterwards, a judge, on such a plea being offered on the fifth day, with an excuse for its not being offered sooner, directed it to be filed as of the fourth day. The appellate court, in disapproving his action, said: "But the rule of court thus authorized to be made has the force of law, and is binding upon the court as well as upon the parties to the action, and cannot be dispensed with to suit the circumstances of every particular case.



The courts may rescind or repeal their rules without doubt, or, in establishing them, may reserve the exercise of discretion for particular cases. But a rule once made without any such qualification must be applied to all cases that come within it until its repeal by the authority which made it": *Thompson v. Hatch*, 3 Pick. 516; *Wall v. Wall*, 2 Har. & G. 79; *Tripp v. Brownell*, 2 Gray, 402. A rule having prescribed the time in which motions in arrest of judgment or for a new trial might be made, the court said: "Where a court has established rules for its government and that of suitors there exists no discretion in the court to dispense at pleasure with its rules, or to innovate on the established practice": *Hughes v. Jackson*, 12 Md. 450. The supreme court of New Jersey, speaking of the action of a trial court in respect to the issuing of a commission to take a deposition, said: "But I am not prepared to say that it is not error in the court to violate or disregard their own established and settled rules of practice. They may modify or rescind them, but, while in force, they are the law of the court, and, as such, a part of the law of the land": *Ogden v. Robertson*, 15 N. J. L. 124. Upon motion for leave to file abstracts and briefs on appeal after the time allowed by the rules of the court had expired the supreme court of Illinois said: "While the court may at any time modify or even rescind its rules, yet, until it does so, it should administer them according to their terms, and it can have no discretion to apply them or not according to its convenience, unless such discretion is reserved in the rules themselves": *Lancaster v. Waukegan etc. Ry. Co.*, 132 Ill. 492; *Treishel v. McGill*, 28 Ill. App. 68; *Burlington etc. R. R. Co. v. Marchand*, 5 Iowa, 468.

*Construing.*—While doubtless the appellate courts would not accept an interpretation of a rule of a subordinate court clearly in conflict with its terms, yet they, being disinclined to interfere with the action of an inferior court in applying and construing its rules, sustain such action, unless they thereby beyond all doubt permit a construction to be placed upon the rules entirely inconsistent with their language: *Mix v. Chandler*, 44 Ill. 174; *Ettinghausen v. Marx*, 86 Ill. 476; *Morrison v. Nevin*, 130 Pa. St. 344; *State v. Smith*, 44 Mo. 112. In truth, we think that the appellate courts, while professing merely to permit the trial court to interpret its own rules of practice, have sometimes allowed it to suspend or disregard those rules, and have thus been able, without admittedly denying to the rules the effect of laws in cases to which they are applicable, to permit the trial court to evade their uniform and impartial enforcement.

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## SUTTON v. PORTER.

[119 MISSOURI, 100.]

**A PAROL PARTITION, THOUGH SOME OF THE PARTIES ARE MARRIED WOMEN** and their husbands did not join therein, if fair and equal and followed by possession in severalty taken and held in accordance therewith, passes the equitable title, and the courts will confirm such partition and vest the legal title in the respective parties.

**A PAROL PARTITION, in which one of the tenants in common did not join at the time, may be ratified by him afterwards by taking possession of and conveying the part assigned to him.**



*Howard and McKee, for the appellants.*

*W. L. Berkheimer, for the respondents.*

<sup>102</sup> BLACK, P. J. Alexander Porter died intestate in 1869, the owner of three hundred and sixty acres of land, leaving a widow and eight children. The two married daughters, Esther J. Sutton and Deborah Dewey, and their husbands, brought this suit for partition, making the widow and other children defendants. The record discloses the following facts.

Arthur Porter, one of the children, conveyed his interest to his brother James E. Subsequent to this conveyance and on the 28th of March, 1888, the widow and children met at her house and agreed to make partition. The widow, Mary Porter, agreed to take a child's part, though entitled to a third of the land for life, thus making nine parts of forty acres each in quantity. The parties appraised each forty, and then made their selections. In making the selections Mrs. Dewey agreed to let her brother William A. have her share, for which she then received eighty dollars in cash, and three notes of William A. for six hundred dollars. James E. Porter also selected two shares because of his purchase of the interest of Arthur. It appears May O. Porter was present, but took no part in selecting her share, because it was supposed she was a minor. A forty-acre tract was, however, set apart for her.

After the selections had been made the parties, except May O., executed quitclaim deeds conveying to <sup>103</sup> each the parcel or parcels so selected, that is to say, to Esther J. Sutton, May Porter, John A. Porter, and Lucy Porter forty acres each, and to William A. Porter and James E. Porter eighty acres each, leaving unconveyed the forty acres reserved for May O. Mrs. Dewey accepted for her share the eighty dollars and three notes of William for six hundred dollars. The deeds were all executed on the 28th of March, 1888, and the grantees then took possession of their respective parcels.

The husbands of Mrs. Sutton and Mrs. Dewey were not present, took no part in making the partition, and did not join in any of the deeds. At that time May O. Porter, for whom the forty acres was reserved, was in fact over the age of eighteen years. On the 15th of October, 1889, she sold the forty to her brother James, and gave him a bond for deed.

The bond sets out by way of recital the partition before made, and states that this forty was allotted to her.

The plaintiffs bring into court the deed to Esther J. Sutton, the eighty dollars paid to Mrs. Dewey and the notes for six hundred dollars executed to her by William. They offer to surrender the money, and consent that the deed may be canceled and pray for partition. The defendants in their answers set up the facts before mentioned, and ask that the partition made by the parties themselves be in all things confirmed. The circuit court entered a decree as prayed for by the defendants, from which the plaintiffs appealed.

The plaintiffs' case is based upon the proposition that the partition deeds are absolutely void as to Mrs. Sutton and Mrs. Dewey, because their husbands did not join in executing them. That these deeds did not convey the legal title of the married women, for the reason that the husbands did not join in them, may be conceded, but it does not follow that the partition is void.

<sup>104</sup> As all parties derive title from a common source there can be no doubt but the principle that a parol partition followed by possession is valid applies to this case: *Bompart v. Roderman*, 24 Mo. 385. And it is settled law in this state that a parol partition, followed by possession, passes the equitable title, and the courts will confirm such a partition by vesting the legal title in the respective parties: *Hazen v. Barnett*, 50 Mo. 506; *Nave v. Smith*, 95 Mo. 596; 6 Am. St. Rep. 79. And such a partition followed by possession, if fair and equal, will be valid and binding though some of the partitioners are under coverture: *McMahan v. McMahan*, 13 Pa. St. 376; 53 Am. Dec. 481; *McConnell v. Carey*, 48 Pa. St. 345; Coke on Littleton, 171 b. Says Freeman: "But while a deed intended to transfer the moiety of a *feme covert* ought to be executed in the same manner and with the same formality as a conveyance of her separate estate, it must not be forgotten that in many of the states parol partitions are recognized and protected, and that a deed of partition, though insufficient of itself to consummate a partition, may, taken with other evidence, establish such a parol partition as the courts will not permit to be disturbed, unless it was clearly unequal when made": Freeman on Cotenancy and Partition, 2d ed., sec. 412.

While the deeds do not convey the legal title of the married women because their husbands did not join in executing

them, still the parol partition is not made invalid because the deeds were executed. The deeds serve to show to whom the respective parcels were allotted. It stands conceded that the partition made by the parties was just and equal. Applying the principles of law before stated, it follows that the parol partition should be in all things confirmed.

It is true Mrs. Dewey did not take her share in kind, but that can make no difference in the result, for she took it in cash and the notes of her brother William. <sup>105</sup> Nor is it material that May O. was not a party to the parol partition when first made; for she not only accepted the partition by taking possession of the forty acres allotted to her, but at a subsequent date she ratified what had been done by her brothers and sisters in the most solemn form.

It is stated on the one side, and conceded on the other, that there are some mistakes in the decree in describing some of the parcels of land. In view of this fact we will reverse the decree and remand the cause, with instructions to the trial court to correct these mistakes, and enter a decree confirming the partition as made by the parties themselves. The costs of this appeal should be divided between all of the parties plaintiff and defendant in proportion of their respective interests in the land, and it is so ordered. Decree reversed, and cause remanded with instructions as above stated.

BARCLAY, J., absent.

The other judges concur.

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**PARTITION BY PAROL.**—That a parol partition of lands, when followed by possession in severalty, is valid in many states, see *Murrell v. Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777, and the authorities collected in the note thereto.

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## DAVIS v. MISSOURI PACIFIC RAILWAY COMPANY.

[119 MISSOURI, 180.]

**MUNICIPAL CORPORATIONS—GRADING STREETS, DAMAGES FOR.**—The owner of a lot fronting on a public street is entitled to consequential damages arising from a change of the natural surface of the street to a legally established grade, if the constitution of the state declares that "private property shall not be taken or damaged without just compensation," if the lot is situated in a small town or city in which the necessity for such grading may never arise. In cities of this class the dedicatory and his assigns should only be held to give implied assent to such improvements as would put the street in a condition for safe and reasonably conven-

ient use upon or near the natural surface, considering the peculiarities of the locality.

**MUNICIPAL CORPORATIONS.—DAMAGES FOR GRADING A STREET TO A PREVIOUSLY ESTABLISHED GRADE** cannot include damages to improvements erected after such grade was established as a matter of record, ascertainable by property owners.

*R. T. Railey*, for the appellant.

*T. B. Haughawout*, for the respondent.

**183 MACFARLANE, J.** This action is for damages done to the plaintiff on account of grading, by defendant, of McGregor street, in the city of Carthage, in front of his property fronting on said street. The petition charged that plaintiff was the owner of lot 175 fronting on the east side of McGregor street, except a small portion thereof which is described; that for the purpose of raising the grade of said street, in the year 1890, defendant constructed in said street, to its full **183** width and about eight feet high, in front of plaintiff's property, an embankment of a permanent character, which was done under a license granted defendant by the city of Carthage, a duly incorporated municipal corporation, by which his property was damaged five hundred dollars.

The answer admitted the ownership of the lot, and that the west end thereof abuts on said street, and charged that the grade of McGregor street was duly established by an ordinance of said city in the year 1882, which was entered in the grade book of said city and was a part of the public records of the city; that, during the year 1890, defendant being desirous of running a spur of its railroad across said street, south of plaintiff's lot, said city of Carthage, through its council, authorized it to do so upon condition that it would raise the grade of the street up to that established by the city; that defendant so constructed the grade by the direction and under the requirement of said city, and wholly for its benefit.

Plaintiff replied that defendant agreed with the city of Carthage to repair the damage that might be done to the street in constructing its railroad across it, and pay all damages to property owners resulting therefrom. There were other issues made and tried, but no point is made on them and they need not be considered.

On the trial it was shown, from the charter and ordinances of the city of Carthage, that it had power to "grade, pave, or otherwise improve and keep in repair all roads, streets, and bridges within the city limits, and that it did establish the

grade of McGregor street in the year 1882; that by an ordinance duly passed and approved in 1890 the defendant was authorized to construct its road across said street south of and adjoining the property of plaintiff and other streets. <sup>184</sup> Defendant was required, as a condition, to construct, erect, and keep in repair suitable crossings or bridges at the intersection of its said railroad track with each and every one of said streets, and shall grade the approaches to such crossings or bridges on both sides of the track."

The crossing of McGregor street was between Eldorado and Limestone streets, and on each side of the railroad crossing the natural surface of the ground was higher than at the point of crossing. The crossing of the street by the railroad was some thirteen feet below the natural surface of the ground, requiring a bridge above it for travel on the street. The bridge and its approaches were made in a careful and skillful manner on the established grades, which raised the street in front of plaintiff's property from two to six feet above the natural surface of the ground, upon which plaintiff's improvements were made as variously estimated by the witnesses. Plaintiff improved his property in 1884. Plaintiff offered evidence tending to prove that when he improved his property he had no knowledge that a grade had been fixed.

The court, of its own motion, gave the following instruction:

"The court instructs the jury that if they believe from the evidence that the plaintiff in 1890 was the owner of lot 175 in North Carthage, Jasper county, Missouri, except that part of said lot described in defendant's answer which had theretofore been sold to defendant, and that said lot and the part thereof so owned by plaintiff fronted on McGregor street in the city of Carthage, and that defendant, in building its railroad across McGregor street, near said premises and lot, built the same below the grade of said McGregor street, and, in constructing a bridge over and above its railroad on said street and approaches to said bridge, <sup>185</sup> filled up said McGregor street and raised the same in front of plaintiff's said lot, and damaged plaintiff's said lot, and depreciated the value thereof, then the jury should find the issue in favor of the plaintiff."

Defendant asked, and the court refused to give, the following instructions: "If the jury believe from the evidence that the city of Carthage, through its council, in 1882, or prior thereto, established the grade of McGregor street, and that the work done by said defendant adjacent to said lot 175, upon

said street, was done with the consent and by the direction of said city of Carthage, that said work was performed in a workmanlike manner, and simply made said street to conform to the grade established by said city aforesaid, along said street, and in front of plaintiff's said lot 175, then the plaintiff is not entitled to recover in this action, and the jury should find for the defendant."

The ruling of the court in giving and refusing these instructions sufficiently presents the only question submitted to us: 1. Is the owner of a lot fronting on a public street entitled to consequential damages arising from the change of the natural surface of the street to a legally established grade?

Neither the statute nor the charter of the city of Carthage, nor its ordinances, prescribed any rule for compensating the owner for the damages suffered in such cases; and it was well settled, before the adoption of the constitution of 1875, that a municipal corporation incurred no liability to the owner of a lot fronting upon a public street for damages resulting from a change of an established grade, if the improvement was executed in a careful and skillful manner: *Van De Vere v. Kansas City*, 107 Mo. 83; 28 Am. St. Rep. 396, and cases cited. The right, then, if one exists, must be found under section 21, <sup>186</sup> article 2 of the constitution which provides "that private property shall not be taken or damaged for public use without just compensation." Under that section it was declared, soon after the adoption of the constitution, that "when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for the public use within the meaning of the constitution": *Werth v. Springfield*, 78 Mo. 110. This declaration, though but a *dictum* in that case, has been quoted approvingly in subsequent cases: *Sheehy v. Kansas City Cable Ry. Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Gibson v. Owens*, 115 Mo. 258.

In none of the cases cited was the question of changing the original surface of the street to an established grade involved; nor do we find that the exact question has ever been decided by this court. Judge Dillon, in his valuable book on municipal corporations, takes the position, which he supports with his usual fairness and ability, that a city would not, under such constitutional provision, be liable for such damages. His conclusion is expressed in the following language: "In view of these considerations it seems to us clear that for the

original establishment of a grade line, and the reduction of the natural surface of the street for street purposes to such line, there is no legal right, or even natural equity in the dedicator or his assignee, to compensation": 2 Dillon on Municipal Corporations, secs. 995 a, 995 b. The learned author agreed that some of the decisions under the constitutional provision, upon the exact point, gave it a scope greater than the one he suggests.

While the reasons given for the nonliability of the city in such cases have much force, indeed are quite conclusive when applied to the larger cities of the country, which are enlarging their territory to accommodate their increasing population and business, and in which streets <sup>187</sup> are generally graded, yet we do not think that the rule suggested would operate justly to property owners in towns and smaller cities, in this state, in which the necessity for such grading, or the ability to pay for it, may never arise. In municipalities of this class, in which most of the towns and cities of this state fall, the dedicator and his assigns should only be held to give implied assent to such improvements as would put the street in a condition for safe and reasonably convenient use upon or near the natural surface, considering the peculiarities of the locality. If damages should be assessed in opening new streets upon the theory, as claimed, that the city should, at any time thereafter, have the right without further compensation, to raise or lower the grade as the convenience or necessity of the public might demand, the cost in damages in many cases would virtually prohibit such improvements. In a majority of towns and cities in this state the natural surface is adopted and used by the public, in making their improvements, as the street grade, and raising or lowering it to an artificial grade might be more damaging than changing one artificial grade to another. If public convenience at any time requires the grading of a street it is but just that the public should bear the burdens of having it done.

We are of the opinion, therefore, that the rule which allows compensation for consequential damages to property, caused by a material change of grade from the natural surface of the street, is the most equitable to the property owners, and best conserves the public interest, and this rule is generally adopted under similar constitutional provisions: *Harmon v. Omaha*, 17 Neb. 548; 52 Am. Rep. 420; *City Council v. Townsend*, 80 Ala. 491; 60 Am. Rep. 112; *McElroy v. Kansas City*,



21 Fed. Rep. 257; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 436; *Reardon v. San Francisco*, 66 Cal. 492; 56 Am. Rep. 109; *Atlanta v. Green*, 67 Ga. 886; *Fort Worth v. Howard*, 3 Tex. Civ. App. 537.

<sup>188</sup> 2. Is a property owner entitled to consequential damages to his improvement thereon by reason of the city changing the street to a grade previously established? We think not. When the authorities of a city are of the opinion that the proper improvement of any of its streets may require that they should be graded, though the city may not at the time be in a condition to incur the expense, we think it would be entirely proper, in order to protect itself against increased damage and cost, that it should establish a grade to which subsequent improvement of adjacent property could be made to conform. If this is done, and the grade so established is made a matter of record ascertainable by property owners, they should be bound by it.

The decisions of this court show that the constitutional provision is not broad enough to cover every possible damage that may result to a property owner from making public improvements. The damage has, in some cases, been limited to such as directly and especially affect the property itself, or some right or easement connected therewith: *Van De Vere v. Kansas City*, 107 Mo. 83; 28 Am. St. Rep. 396. To that extent the common law has not been changed. Independent of the constitution the right of a city to change the grade of its street without liability to the owners of adjacent property is unquestioned. The ground of doctrine is thus stated in a leading case: "Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as <sup>189</sup> they shall see fit . . . . [They are] presumed to foresee the changes which public necessity or convenience may require": *Callender v. Marsh*, 1 Pick. 418.

Now, while the constitution intervenes and modifies the common-law rule so as not to require the owner to "calculate chances" of changes in the grade, it is not broad enough to allow compensation to one who knowingly, or without investigation, makes his improvements on a grade different

from one previously established: *Denver v. Vernia*, 8 Col. 399; *Harmon v. Omaha*, 17 Neb. 549; 52 Am. Rep. 420; *City Council v. Townsend*, 80 Ala. 491; 60 Am. Rep. 112.

Plaintiff's damages should have been confined to that done the lot without reference to any improvement placed thereon after the grade had been established. Reversed and remanded

All concur, except BARCLAY, J., who is absent.

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**MUNICIPAL CORPORATIONS—DAMAGES FOR GRADING STREETS.**—This question is thoroughly discussed in the extended notes to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835; *Goddard v. Inhabitants*, 30 Am. St. Rep. 389; *Dorman v. Jacksonville*, 7 Am. Rep. 260; *Sheehy v. Kansas City etc. Ry. Co.*, 4 Am. St. Rep. 401; and *Wilson v. Mayor*, 43 Am. Dec. 723, and the note to *Columbus Gas etc. Co. v. Columbus*, 40 Am. St. Rep. 653.

**MUNICIPAL CORPORATIONS.—WHETHER LIABLE FOR IMPROVEMENTS** ERECTED after the establishment of the grade: See the extended note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 844.

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## HOWSMON v. TRENTON WATER COMPANY.

[119 MISSOURI, 804.]

**CONTRACTS, WHO MAY SUE THEREON.**—A person for whose benefit an express promise is made in a valid contract between others may maintain an action thereon in his own name. The contract must have been made for his benefit as its object, and he must be intended to be benefited thereby.

**CONTRACTS, WHO MAY SUE THEREON.**—A third person who is only indirectly and incidentally benefited by a contract has no right of action thereon.

**CONTRACTS TO SUPPLY CITY WITH WATER, PROPERTY OWNER'S SUIT THEREON.** If a water company contracts with a city to supply water for the extinguishment of fires, and to be answerable for damages resulting from a failure to comply with such contract, a property owner and taxpayer within such city has no contract relations with such water company, and therefore cannot maintain an action against it upon the contract for damages arising from a failure to supply water as agreed upon, though such failure has resulted in the destruction of his property by fire.

*Harber and Knight and A. W. Mullins*, for the appellant.

*R. L. Yeager*, for the respondent.

206 BRACE, J. This is an appeal from the judgment of the circuit court of Grundy county, sustaining a demurrer to the plaintiff's petition, the material allegations of which are in

**substance as follows: That the plaintiff is a resident citizen and taxpayer of the town of Trenton in said county, and the owner of a large amount of valuable property within the corporate limits of said town, subject to taxation for ordinary purposes, and to a special tax of five mills on the dollar annually for the purpose of discharging the obligations of said town to the defendant on the contract sued on herein, all of which he has regularly and promptly paid.**

**That by a contract entered into, by ordinances, between the town of Trenton and the defendant, the said defendant (in consideration of the franchise granted it, and the privilege of collecting certain water rates from its citizens, and of the sum of two thousand dollars, to be paid annually by the town, to be raised by an annual tax of five mills as aforesaid, all of which the defendant has received and enjoyed) promised and agreed with said town to furnish at all times an adequate supply of good, clear, and wholesome water, for fire and other purposes, for public and private use, under such a pressure <sup>207</sup> as to have the power to throw at all times six streams of water through fifty feet of two and one-half inch rubber hose, and one inch ring nozzle eighty feet high in the business portion of the town, and to throw at least two effective streams at any one time, in any other part of the town accessible from the mains; and further agreed that "should said water company from lack of water supply, or any other cause except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect."**

**That on the 24th of March, 1889, plaintiff's dwelling-house in said town, with the household and kitchen furniture and wearing apparel therein contained, all of the value of three thousand seven hundred dollars, was destroyed by fire, that said house was close to the main of defendant, and situated at a place where, in the event a fire should there occur, it was the duty of defendant under said contract to furnish an adequate supply of water with force and power sufficient to extinguish such fire; which the defendant, without any providential or unavoidable accident, failed to do, and, by reason of such failure, plaintiff's property was destroyed, to his damage in the sum of three thousand seven hundred dollars.**

**1. It is well-established law in this state, by a line of decisions extending from the year 1847 to the present date, "that a**

person for whose benefit an express promise is made in a valid contract between others may maintain an action upon it in his own name": *Ellis v. Harrison*, 104 Mo. 270; *State v. Leclerc Gas Light Co.*, 102 Mo. 472; 22 Am. St. Rep. 789; *Fitzgerald v. Barker*, 70 Mo. 685; *Rogers v. Gornell*, 51 Mo. 466; 58 Mo. 589; *Meyer v. Lowell*, 44 Mo. 328; *Robbins v. Ayres*, 10 Mo. 539; 47 Am. Dec. 125; *Bank of Missouri v. Benoit*, 10 Mo. 521. And such is now the prevailing doctrine in America, by the great weight <sup>200</sup> of authority: 3 Am. & Eng. Ency. of Law, 863, note 5. This doctrine, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become so general and far reaching in its consequences as to have ceased to be simply an exception, but is recognized, within certain limitations, as an affirmative rule.

The foregoing cases from this court are in harmony with the rule as laid down in *Lawrence v. Fox*, 20 N. Y. 268, "that an action lies on a promise made by the defendant, upon valid consideration to a third party, . . . although the plaintiff was not privy to the consideration and that such promise is to be deemed made to the plaintiff if adopted by him, though he was not a party to or cognizant of it when made": *Meyer v. Lowell*, 44 Mo. 328. "It is not every promise [however] made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit, as its object, and he must be the party intended to be benefited": *Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195; *Wright v. Terry*, 23 Fla. 160; *Austin v. Seligman*, 18 Fed. Rep. 519; *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541, and cases cited. In other words, the rule is not so far extended as to give to a third person, who is only indirectly and incidentally benefited by the contract, a right to sue upon it." But "the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated": *Burton v. Larkin*, 36 Kan. 246; 59 Am. Rep. 541; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50; 57 Am. Rep. 249.

<sup>200</sup> In the opinion delivered by Allen, J., in *Vrooman v. Turner* (1877), 69 N. Y. 280, 25 Am. Rep. 195, it was said:

“Judges have differed as to the principle upon which *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent of the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.”

An examination of very many cases decided before and since it was so held in that case satisfies us that the rule has been confined to such cases in this state as well as elsewhere, and upon that principle, when this case was before the Kansas City court of appeals in an action by another party (*Phoenix Ins. Co. v. Trenton Water Co.*, 42 Mo. App. 118), it was, in effect, held that the plaintiff had no cause of action against the water company because the town of Trenton was under no obligation to the plaintiff to furnish an adequate supply of water and power to extinguish the fire by which the premises were consumed. And in support of its position the following additional cases were cited: *Davis v. Clinton Water Works Co.*, 54 Iowa, 59; 37 Am. Rep. 185; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; 33 Am. Rep. 1; *Ferris v. Carson Water Co.*, 16 Nev. 44; 40 Am. Rep. 485; *Fowler v. Athens etc. Water Works Co.*, 83 Ga. 219; 20 Am. St. Rep. 313, and *Atkinson v. Newcastle etc. Water Works Co.*, L. R. 2 Ex. Div. 441.

The last of these cases is not in point, since the action in that case was for the breach of a public statutory duty, and the court held that the action would not <sup>310</sup> lie because the statute gave no right of action to the plaintiff. The cause of the action in each of the other cases was for a breach of duty which it was alleged the defendants owed the plaintiff under a contract with the city, to which the plaintiff was not a party, whereby they agreed to furnish an adequate supply of water and power to extinguish fires in the town or city. To which it was replied in the Connecticut case (decided in 1878): “Whatever benefit the plaintiffs could have derived from the water would have come from the city through its fire department. The most that can be said is, that the defendants were under obligation to the city to supply the hydrants with water.

The city owed a public duty to the plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it clear that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim."

In the Iowa case, decided in 1880, it was replied: "The city, in exercise of its lawful authority, to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. . . . It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government." In the Nevada case, decided <sup>311</sup> in 1881, after citing *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, with approval, and quoting the reform, it was replied: "The board of trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property holders of the town, but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist in order to give him a right of action upon the contract."

In the Georgia case, decided in 1889, in an opinion by Bleckley, C. J., it was replied: "The present case is not based upon the breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before the court. . . . There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the pub-

lic, the breach being made by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community, and a taxpayer to the government. Unless made so by the statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire: *Wright v. Augusta*, 78 Ga. 241; 6 Am. St. Rep. 256; 7 Am. & Eng. Ency. of Law, 997, et seq."

The case in hand is on the contract made by the water company with the town of Trenton, and the only feature that it presents that can take it out of the principle laid down in these cases is that provision was <sup>312</sup> made in this contract for a special tax to be raised to provide part of the consideration the water company was to and did receive, to which the plaintiff contributed, and an express promise contained in the contract that "should said water company from lack of water, or any other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect"; this argument being that here is an express promise of indemnity in a contract in which the plaintiff is privy to the consideration at least.

The argument was met by the supreme court of Iowa in *Becker v. Keokuk Water Works*, 79 Iowa, 419, 18 Am. St. Rep. 377, decided in 1890, probably not published when this question was before the Kansas City court of appeals, in the following manner: 1. "The chief question raised by the demurrer was considered in *Davis v. Clinton Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fires, and to that fund plaintiff contributed. It is said that in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the taxpayers. In making the contract the city discharged one of the duties for which it was created; and in raising the required money it only provided the consideration due from it by virtue of the contract. It will hardly be claimed that



defendant could proceed against a taxpayer, in the first instance, for any unpaid money due under the contract from the city."

<sup>313</sup> "It was decided in *Van Horn v. City of Des Moines*, 63 Iowa, 448, 50 Am. Rep. 750, that the city was not liable for the failure of the water-works company to furnish the water required by its contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise for malfeasance or neglect on the part of the company. . . . Much stress is placed by appellant upon that part of section 18 which provides 'that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement, or fault of itself or its employees while engaged in the construction or operation of said works.' Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed: *Clark v. City of Des Moines*, 19 Iowa, 212; 87 Am. Dec. 423; *McPherson v. Foster*, 43 Iowa, 57; 22 Am. Rep. 215. The law which authorizes cities to contract with individuals and companies for the building and operating of water-works confers no power upon a city to make a contract of indemnity for the individual benefit of a taxpayer, for a breach of which he could maintain an action in his own name."

The town of Trenton, under its charter, had power to pass ordinances "to prevent and extinguish fires" (Laws 1856, p. 353), and as incident thereto power to contract for a supply of water for that purpose. But it would seem, under the authorities cited, the plaintiff cannot maintain this action for cogent reasons which have and may be put in several ways:

1. Although it was within the power of the town by contract to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to plaintiff: *Heller v. Sedalia*, 53 Mo. 159; 14 Am. Rep. 444. <sup>314</sup> Consequently, the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a contract must be brought by a party to the contract in cases where the promisee owed a duty to the third party, which the promisor undertook to perform.

2. A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of

them in every act, and the relation of privity is not and cannot be introduced into such contracts, by reason of taxpaying or the discharge of any civil duty by any individual citizen.

3. The benefits to be conferred upon the individual citizen by the contract is incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity.

4. It does not clearly appear that the benefit was intended for the citizens in their individual capacity, but may have been intended for the protection of the municipality, and, in the absence of express power in the municipality to make contracts for the indemnity of its individual citizens, should be so construed: *City of Kansas v. O'Connell*, 99 Mo. 857.

5. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligations of the contract upon its part for the benefit of all the citizens of the municipality; and for the enforcement of the terms thereof the citizens must look to the authorities of the city, and cannot individually maintain an action for a breach of the contract.

6. The town had no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another.

315 The appellant is, however, not without authority to sustain his position. In a recent case in Kentucky, decided in 1889, the supreme court of that state held that "where a water company has contracted with a city to furnish at all times a supply of water sufficient for the protection of the inhabitants and property of the city against fire the company must answer in damages for loss by fire resulting from its failure or refusal to perform its contract": *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340; 25 Am. St. Rep. 536. Authority for this proposition is not therein cited, and the reasoning upon which the position is rested does not seem to us entirely satisfactory.

The plaintiff's contention also receives some support from the reasoning of Judge Thompson in *Lampert v. Laclede Gas Light Co.*, 14 Mo. App. 376, according to whose views it would seem that the contract declared upon here should raise, on the part of the defendant, a public duty to be performed for

the benefit of the inhabitants of the town distributively, and for the negligent nonperformance of that duty an action would lie by the town "suing upon the contract, or by any individual specially damaged thereby, proceeding as for the nonperformance of a public duty, and setting up the contract by way of inducement."

As before stated, the suit here is upon the contract, and not against the water company for the negligent nonperformance of a public duty, and these views have simply persuasive force. At all events, the position of the Kansas City court of appeals and the ruling of the court below in this case is sustained by the weight of authority, and the judgment herein will be affirmed.

All concur except BARCLAY, J., absent.

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**CONTRACTS FOR THE BENEFIT OF THIRD PERSON—WHO MAY SUE THEREON.**—If one make a promise to another for the benefit of and available to a third person, the latter can maintain an action on the promise in his own name: *Mazzy v. New Hampshire etc. Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325; but in *Linneman v. Moross*, 98 Mich. 178; 39 Am. St. Rep. 528, it was held that a promise made by one person to another for the benefit of a third, who is a stranger to the consideration, cannot be enforced by the latter. This subject is fully discussed in a monographic note to the latter case.

**CONTRACT BETWEEN MUNICIPALITY AND WATER COMPANY—RIGHT OF PRIVATE OWNER TO RECOVER FOR BREACH OF.**—A contract and franchise granted by a city to a water company requiring that the "grantee shall constantly, day and night, except in case of unavoidable accident, keep all fire-hydrants supplied for constant service, and keep them in good order," does not give to a private owner within the city limits, whose property is destroyed by fire, any right of action against such water company on account of its breach of contract in failing to furnish water as agreed. In such case there is no privity of contract between the water company and the private owner: *Eaton v. Fairbury Water etc. Co.*, 37 Neb. 546; 40 Am. St. Rep. 510, and note, with the cases collected.

## STATE v. WALBRIDGE.

[119 MISSOURI, 333.]

**STATUTE.—A REPEAL BY IMPLICATION** does not exist unless there is a positive repugnancy between the provisions of the new law and those of the old, and even then the law is repealed by implication only *pro tanto* to the extent of the repugnancy.

**DEFINITION.—A PENALTY** is a punishment which the law exacts for its violation, and may be fine, forfeiture, deprivation of office or other right, or by any other means sanctioned by law.

**CONSTITUTIONAL LAW—REMOVAL FROM OFFICE, FOR WHAT CAUSES MAY BE AUTHORIZED.**—If the constitution of the state declares that the legislature shall, in addition to other penalties, provide for removal from office of county, city, town, and township officers on conviction of illegal, corrupt, or fraudulent violation or neglect of official duty, the legislature is not thereby limited to the power of passing laws for the removal of officers on the ground specified in this provision of the constitution.

**MUNICIPAL CORPORATIONS—CRIMES, POWER TO PROVIDE FOR PUNISHMENT OF.**—Though an act is made criminal, and punishable by the laws of the state, a municipality may also make it punishable, and authorize proceedings for the imposition of such punishment.

**MUNICIPAL CORPORATIONS.—ALL ORDINANCES OF MUNICIPAL CORPORATIONS** within the limits of their authority have the force of laws passed by the legislature of the state.

**MUNICIPAL CORPORATIONS.—THE REMOVAL OF AN OFFICER** of a municipal corporation for just and reasonable cause is one of its common-law powers.

**PUBLIC OFFICERS—REMOVAL OF—MEANS OF EXERCISING POWER OF.**—When a municipal ordinance provides for the removal of officers for specific causes, but does not point out the means whereby the removal is to be effected, the means necessary to the exercise of the power pass as incidents of the grant.

**PUBLIC OFFICERS.—REMOVAL FROM OFFICE FOR CAUSE CANNOT TAKE PLACE WITHOUT NOTICE** to the accused officer. Though the law conferring authority to make such removal does not expressly provide for such notice, still it must be presumed to have been intended as a prerequisite to the exercise of the power.

**PUBLIC OFFICERS—REMOVAL—QUESTION FOR THE COURTS.**—THOUGH THE removal of an officer for cause is authorized by law, the courts must determine the sufficiency of the alleged cause.

**PUBLIC OFFICERS.—A MUNICIPAL ORDINANCE AUTHORIZING THE MAYOR TO REMOVE AN OFFICER FOR CAUSE** is valid, and entitles the mayor to exercise all powers incident to the authority conferred, such as giving notice to the accused of the charges against him, and hearing witnesses offered either in his behalf or in support of such charges.

*Leverett Bell and William B. Thompson, for the relator.*

*W. C. Marshall, for the respondent.*

334 SHERWOOD, J. By this original proceeding in this court a rule was issued and served on the mayor of St. Louis, requiring him to show cause why he should not be prohibited

from proceeding to try the relator on certain charges which had been preferred against him by Robert E. McMath, president of the board of public improvements, which charges showed upon their face certain derelictions of official duty on the part of relator as commissioner of public buildings.

After setting forth the notice to the relator from the mayor, the charges preferred, and the items and particulars offered in their support, the petition praying for the writ concludes: "The relator states that no provisions of law have been enacted or are in force governing proceedings at a trial of the character aforesaid before the mayor, or providing means by which the relator can compel the attendance of witnesses on his behalf at said hearing, or denouncing the pains and penalties of perjury against witnesses who at said proceedings shall testify falsely to any material fact in the matter, or providing for a trial by jury.

"That under the general statutes of this state, by sections 7127-7130, the circuit court of the city of St. Louis has exclusive jurisdiction of the trial and determination of the matters which the said <sup>385</sup> mayor is proceeding, as aforesaid, to try and determine in the premises, and at said trial in the circuit court the accused is entitled to a trial by jury.

"That the proceedings of the mayor, as aforesaid, are an infringement on the rights of the relator, and are an attempt to exercise authority that the mayor does not possess, and are an encroachment upon the authority and jurisdiction of the courts of this state.

"Wherefore, the relator prays that a writ of prohibition to the said Cyrus P. Walbridge, mayor, as aforesaid, be directed, prohibiting him from proceeding or holding the trial aforesaid," and is duly certified.

The respondent, for his return, demurred generally on the ground that the petition did not state facts sufficient, etc. And because the facts stated in the petition did not bring this cause within the classification of causes enumerated in section 7 of article 14 of the constitution, nor within section 7127 of the Revised Statutes of 1889, etc., etc. These sections were enacted in 1877: Laws of 1887, p. 346.

Section 7 aforesaid of the constitution declares: "The general assembly shall, in addition to other penalties, provide for the removal from office of county, city, town, and township officers on conviction of willful, corrupt, or fraudulent violation or neglect of official duty."

Section 7127 of the statute, in obedience to the constitutional mandate just quoted, and also of section 18 of article 2 of that instrument, provides that "any person elected or appointed to any office or employment of trust and profit, under the laws of this state, or any ordinance of any municipality in this state, except such officers as may be removed by impeachment, who shall fail to personally devote his time to the performance of the duties of such office or employment of trust or profit, and any county, city, town, or township officer who shall <sup>see</sup> be guilty of any willful, corrupt, or fraudulent violation or neglect of any official duty, shall forfeit his office, and be removed therefrom as hereinafter provided."

The other sections relied on by relator provide for the enforcement of the section just quoted, by a complaint filed by a prosecuting officer, etc., in the circuit court, and a trial after so many days with and by a jury if demanded, and for a judgment of removal if the defendant be found guilty of violating the provisions of section 7127, etc.

Section 5 of article 4 of the city charter provides that "any elected city officer may be suspended by the mayor and removed by the council for cause; and any appointed officer may be removed by the mayor or council for cause. In either case the mayor shall temporarily fill the vacancy, except as hereinafter provided."

The office of relator is appointive, and its term is four years (Revised Ordinances, 687, sec. 681), not expiring until 1895. The revised ordinances, in briefer terms than the charter, provide for the removal by the mayor of an appointed officer "for cause" (secs. 917, 919, 1105), but though provision is made for charges being preferred, and a trial had where the mayor suspends an elected officer (secs. 918, 1094, et seq.), yet no such provision has been discovered in regard to appointive officers.

<sup>see</sup> The foregoing premises are laid down as the basis for the following remarks:

In *Manker v. Faulhaber*, 94 Mo. 430, action was brought against the mayor and others for damage for maliciously removing the plaintiff from the office of city collector, in November, 1878. The defendants justified under the amended charter of that city, approved March, 1875, which contained this provision: "The mayor . . . shall have power, with the consent of the board of aldermen, to remove from office

any person holding office created by charter or ordinance, for cause, and on application of three-fourths of the board of aldermen he shall be compelled to remove any officer created by ordinance." The trial court refused to permit that section of the charter to be read in evidence, and instructed the jury that, under the constitution and laws of Missouri, as they existed in November, 1878, the mayor and board of aldermen of the city of Sedalia had no legal right or authority to remove the plaintiff from the office of city collector. This action of the trial court was held erroneous; that the charter of Sedalia was unaffected by the act of 1877; that the charter not conferring on the mayor <sup>and</sup> and aldermen the power to remove a municipal officer, was special and particular, while the act of 1877 was general and affirmative, without repealing words; that the two acts were not irreconcilably inconsistent, and, therefore, there was no repeal by implication.

That ruling cannot be otherwise regarded than as decisive of this case, since the charter of St. Louis of 1876 is no more inconsistent with the general law of 1877 than was the charter of Sedalia on the point already quoted. *Manker v. Faulhaber* 94 Mo. 430, has been approvingly cited as to repeals by implication in *State v. Noland*, 111 Mo. 484, and directly followed in *State v. Slover*, 113 Mo. 202, where it was distinctly ruled that section 8233 of the Revised Statutes of 1889, providing that an official stenographer might be removed without the intervention of a jury, for "incompetency or any misconduct in office," by the judge of the circuit court, on charges entered of record, and notice given, could stand as consistent with section 7127, aforesaid, and that the provisions of section 8233 might well be regarded as simply furnishing a cumulative remedy to that ordained in the former section, in relation to removals for failure to give personal attention to official duties.

"A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy": Anderson's Law Dictionary, 879.

Other considerations tend toward the same result as that announced in the cases cited. It will be observed <sup>see</sup> that



Section 7 of article 14 aforesaid says: "The general assembly shall, in addition to other penalties, provide for the removal," etc. The term "penalty" has been defined as the punishment which the law inflicts for its violation. It is commonly but not exclusively a pecuniary punishment; it embraces as well the idea of forfeiture as of a fine: 18 Am. & Eng. Ency. of Law, 269, and cases cited.

The terms "penalty" and "punishment" are frequently used as the synonyms of each other. Thus, Webster defines punishment as pain, suffering, or loss inflicted on a person because of a crime or offense, a penalty inflicted by a court of justice; and the latter term he defines as punishment for a crime or offense. For the last word he gives as synonyms, misdemeanor, transgression, delinquency; and for misdemeanor he gives misconduct, misbehavior. He also gives penalty, fine, mulct, as the equivalents of forfeiture; that is, the loss of some right, estate, office, or effects by an offense, etc. "Punishments not corporal are fines, forfeitures, suspension, or deprivation of some political or civil right; deprivation of office, and being rendered incapable to hold office": 2 Bouvier's Law Dictionary. The deprivation of any civil right for past conduct is punishment for such conduct: *Cummings v. Missouri*, 4 Wall. 277.

Taking, then, the word "penalty" in the broad sense, already set forth in the foregoing definitions, as tantamount to punishment, fine, forfeiture, deprivation of some office or right, for some offense, misdemeanor, misconduct, or delinquency, it is not difficult to see that the framers of the constitution did not intend to limit the power of the general assembly to pass laws for removal from office county, city, or township officers to the grounds specified in section 7. The exercise of that power was commanded "in addition to other penalties," penalties theretofore existing or which might <sup>391</sup> subsequently be enacted.

Long before the constitution of 1875 was adopted penalties had been imposed by the general assembly for official misconduct. As far back as 1825 we had a statute, still on the statute books, providing for punishing any officer who should be convicted of "any willful misconduct or misdemeanor in office, or neglect to perform any duty enjoined on him by law": *State v. Gardner*, 2 Mo. 23; Stats. 1835, sec. 20, p. 200; Rev. Stats. 1845, sec. 21, p. 391; Rev. Stats. 1855, sec. 21, p. 614; Gen. Stats. 1865, sec. 21, p. 808; 1 Rev. Stats.

1879, sec. 1488; Rev. Stats. 1889, sec. 3737. Other statutes are still extant which long antedate our present constitution, making provision for the punishment by indictment, and for removal from office of officers found guilty of willful and malicious oppression, partiality, or abuse of authority or extortion or fraud committed in an official capacity: Rev. Stats. 1835, pp. 200, 201; Rev. Stats. 1845, pp. 390, 391; Rev. Stats. 1855, pp. 613-615; Gen. Stats. 1865, p. 808; Rev. Stats. 1879, secs. 1483-1486, 1488; Rev. Stats. 1889, secs. 3732-3735.

The legislature evidently took the same view as that already announced as to the meaning of "other penalties," when they enacted section 1642 of the Revised Statutes of 1879, which first provided for the punishment by fine or imprisonment, or both, of any state, county, city, town, or township officer for drunkenness in office, and for the removal of such officer, unless one liable to impeachment: Rev. Stats. 1880, sec. 3928.

The conclusion from the premises seems inevitable that the whole machinery of the law as then provided, or thereafter might be provided, for the punishment or removal from office of unworthy officials, was regarded by the framers of the constitution as furnishing additional penalties to those they commanded the general assembly, by section 7, to furnish ~~for~~ for the removal of the class of officers enumerated in that section. If the words in question do not bear the meaning here imputed to them, then they must be regarded as without meaning, force, or effect, which under a familiar rule is an impossible supposition. If these views be correct, then the term "other penalties," as used in section 7 aforesaid, may well be applied also to provisions in the city charter and in ordinances passed in pursuance thereof, punishing neglect, misconduct, or misdemeanors in the performance or nonperformance of official duty by removal from office. There is nothing, certainly, in the section in hand which restricts "other penalties" to those created by the general assembly, and no reason is perceived why they should thus be restricted. This court is thoroughly committed to the doctrine that a city may pass ordinances punishing as crimes acts also made punishable by indictment under the laws of this state. In *Ex parte Hollwedell*, 74 Mo. 401, it was said: 'The right of a municipal corporation in this state to maintain in its own name a proceeding to recover a fine for non-

observance of an ordinance has never been questioned, even though there be a general law of the state also imposing a fine for a like offense": Citing *St. Louis v. Cafferatta*, 24 Mo. 94; *Independence v. Moore*, 32 Mo. 392; *St. Louis v. Bentz*, 11 Mo. 61; *State v. Wister*, 62 Mo. 592; *State v. Harper*, 58 Mo. 530.

In the more recent case of *St. Louis v. Schoenbusch*, 95 Mo. 618, under the general welfare clause of the charter, page 326, section 26, paragraph 14, providing that the city should have power "to pass all such ordinances not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines and penalties," ~~and~~ it was ruled, after citing some of the above authorities, that an ordinance providing for the punishment of any person who should cruelly beat any dumb animal, etc., should be deemed guilty of a misdemeanor, and upon conviction should be fined, etc., was valid, notwithstanding there was no special grant of power to be found in the charter for passing such an ordinance; and notwithstanding the offense was punishable either under the general laws of this state or under the ordinance, this court holding that the general welfare clause heretofore quoted furnished a sufficient basis to uphold the ordinance in question; that it was not inconsistent with the laws and constitution of this state under the authorities cited, and that its enforcement was fairly within the power to maintain the peace, good government, and welfare of the city. By parity of reasoning the same principle may well be applied in the case at bar. Surely nothing could more conduce to the good government and welfare of the city than that it should annex "other penalties" (than those enacted by the general laws of the state) for the punishment of its own officers, than that incompetent or unworthy officers should be removed in a more summary way than that afforded by the method of procedure provided in section 7127 and its associate sections.

The legislators of a city when assembled for the performance of their legitimate functions, and when acting within the confines of their delegated authority, constitute, as Judge Scott happily expressed it in *Taylor v. Carondelet*, 22 Mo. 105, "a miniature general assembly," and the law-making power

"gave their ordinances . . . the force of laws passed by the legislature of the state."

Lord Abinger said: "The by-law has the same effect within its limits, and with respect to the persons <sup>294</sup> upon whom it lawfully operates, as an act of parliament has upon the subjects at large": *Hopkins v. Mayor*, 4 Mees. & W. 621. It is hardly necessary to say that this is the general view: 1 Dillon on Municipal Corporations, 4th ed., sec. 308, and cases cited; *Fath v. Tower Grove etc. Ry. Co.*, 105 Mo. 548, and cases cited.

Besides, as stated by the eminent author just cited, "the power to amove a corporate officer from his office, for reasonable and just cause, is one of the common-law incidents of all corporations. This doctrine, though declared before, has been considered as settled ever since Lord Mansfield's judgment in the well-known case of *The King v. Richardson*, 1 Burr. 519. It is there denied that there can be no power of amotion, unless given by charter or prescription; and the contrary doctrine is asserted—that from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental": 1 Dillon on Municipal Corporations, sec. 240.

In this instance not only was the power of amotion of an offending officer for reasonable and just cause one of the common-law incidents and resultants of the incorporation of the city, but it was specifically conferred by the charter, and delegated to the mayor, and enforced by ordinance. It is true that neither charter nor ordinance make any provision for the means whereby the amotion of an appointed officer is to be effected; but where a grant of power is given, all the means necessary to effectuate the power pass as incidents of the grant: Sutherland on Statutory Construction, sec. 341; 2 Beach on Public Corporations, sec. 1814; *Ex parte Marmaduke*, 91 Mo. 262; 60 Am. Dec. 250, and cases cited; *Grover v. Huckins*, 26 Mich. 476.

In the case presented, the power to amove the officer is "for cause," and no notice is mentioned as requisite to be given to the officer to be proceeded against. But the law, in accordance with the principles <sup>295</sup> of justice—principles which are fundamental and eternal, will require that notice be given before any person be passed upon, either in person, estate, or any other matter or thing to which he is entitled. And though the statutes do not in terms require notice, the law will imply that notice was intended: *Laughlin v. Fairbanks*, 8 Mo. 370;

*Wickham v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152. And what the law will imply is as much part and parcel of a legislative enactment as though set forth in terms: *State v. Board of Equalization*, 108 Mo. 235; Sutherland on Statutory Construction, sec. 334, and cases cited.

Notice in this case, however, had been given and charges preferred, and this court, following the authorities elsewhere, has decided that even where the removal is "for cause" that still notice must be given: *State v. City of St. Louis*, 90 Mo. 19. See, also, Mechem on Public Offices and Officers, sec. 454. But, of course, in circumstances like the present, if an officer be removed, it belongs to the courts to determine the sufficiency of the cause alleged: Mechem on Public Offices and Officers, sec. 450, and cases cited.

It is alleged in the petition, and also in the brief of relator, that, in a trial before the mayor, there are no provisions of law for summoning witnesses in his behalf, or to compel their attendance, or to swear them, or denouncing the pains and penalties of perjury in giving their testimony. But the mayor is authorized and required by law to administer any and all oaths in connection with the business of his office, etc: Rev. Stats. 1889, sec. 7120. This being the case, if any witness should swear falsely before the mayor on a trial of charges against an officer, perjury could be assigned thereon: 2 Bishop's New Criminal Law, secs. 1015, 1017.

And section 31 of article 4 of the charter requires of the city marshal that he execute and return all processes <sup>296</sup> or orders of the mayor. But even if there were no such provisions, no machinery provided by the charter or ordinance for a trial before the mayor, yet the power being granted by the charter and enforced by the ordinance, the means to effectuate the power granted would pass as a necessary incident. The books are full of illustrations of this axiomatic legal truth, as shown by the authorities heretofore cited. The constitution of Michigan conferred power on the governor to remove certain state officers, for certain specified causes, but provided no means or measures whereby the removal was to be accomplished, nor was there any valid statute prescribing any method of examination or of procedure; and yet, notwithstanding this, it was held that the constitution having conferred such power it was held to be judicial; that it needed no statute to make it operative; that the grant of power carried with it all necessary incidental powers, without

which the grant would be ineffectual, and that the officer proceeded against, in order for the proceedings to be valid, must have notice, charges preferred against him; a full opportunity to examine and cross-examine witnesses, and to be heard on the facts and on the law: *Dullam v. Willson*, 53 Mich. 393; 51 Am. Rep. 128.

Guided by the foregoing authorities, we hold that the charter of the city of St. Louis in the particular under discussion is in harmony with the constitution and laws of this state; that the mayor being endued with power to remove the relator "for cause," could do so on notice given, charges preferred, and full opportunity to be heard, and that the mayor has all the power necessary to carry into effect the authority granted him by the charter, and that the charges contained in the record are sufficient if relator be found guilty thereof to authorize his removal.

Holding these views, we deny the writ of prohibition. All concur.

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**STATUTES—REPEAL BY IMPLICATION.**—Where two statutes are so inconsistent they cannot stand together, the last repeals the first: *Ruels v. Doe*, 23 Ala. 240; 58 Am. Dec. 289; *Edgar v. Greer*, 8 Iowa, 394; 74 Am. Dec. 316, and note; *Ex parte Garza*, 28 Tex. App. 381; 19 Am. St. Rep. 845; *People v. Moran*, 123 N. Y. 254; 20 Am. St. Rep. 732; *Northern Pac. Ry. Co. v. Ellison*, 3 Wash. 225; *State v. Archibald*, 43 Minn. 328; *State v. St. Paul etc. Ry. Co.*, 40 Minn. 353; *Pennie v. Reis*, 80 Cal. 266; *State v. Massey*, 103 N. C. 356. But where a subsequent act on the same subject does not so conflict with a former as to render them impossible to be so construed as to stand together, the latter will not be considered as a virtual repeal of the former: *State v. Wilson*, 43 N. H. 415; 82 Am. Dec. 163, and note; *Carver v. Smith*, 90 Ind. 222; 46 Am. Rep. 210; *Wyman v. Campbell*, 6 Port. 219; 31 Am. Dec. 677; *McCartee v. Orphan Asylum Society*, 9 Cow. 437; 18 Am. Dec. 516; *Warder v. Arell*, 2 Wash. (Va.) 282; 1 Am. Dec. 488; *Herndon v. Reed*, 82 Tex. 647; *State v. Casimere*, 43 La. Ann. 442.

**PENALTY—DEFINITION.**—Penalties are not damages, but are punishments imposed for breach of a duty enjoined by law: *Harbor Commrs. v. Redwood Co.*, 88 Cal. 491; 22 Am. St. Rep. 321, and note. See, also, the extended note to *Graham v. Bickham*, 1 Am. Dec. 331, 340.

**CRIMINAL LAW—PROSECUTION UNDER STATE LAW AND FOR VIOLATION OF MUNICIPAL ORDINANCE.**—The same act committed by a person may constitute a crime against the state law and a different offense against municipal regulation; and the two offenses being different, each may be punished separately without violating a constitutional prohibition against placing one twice in jeopardy: *State v. Fourcade*, 45 La. Ann. 717; 40 Am. St. Rep. 262, and note. See, also, the extended note to *Robinson v. Mayor*, 34 Am. Dec. 642.

**MUNICIPAL CORPORATIONS—EFFECT OF ORDINANCES.**—An ordinance adopted by a municipal corporation pursuant to authority expressly dele-

ated to it by the legislature has the same force within the corporate limits as a statute passed by the legislature itself: *Carthage v. Frederick*, 122 N. Y. 268; 19 Am. St. Rep. 490; *Milne v. Davidson*, 5 Mart. N. S., 409; 16 Am. Dec. 189, and extended note. See, also, *Detroit v. Fort Wayne etc. Ry. Co.*, 95 Mich. 456; 35 Am. St. Rep. 580.

**PUBLIC OFFICERS—REMOVAL—CAUSE, MEANS, POWER, AND NECESSITY FOR NOTICE.**—These questions will be found discussed in *Speed v. Common Council*, 98 Mich. 360; 39 Am. St. Rep. 555, and note; *State v. Duluth*, 53 Minn. 238; 39 Am. St. Rep. 595, and note; *Hallgren v. Campbell*, 82 Mich. 255; 21 Am. St. Rep. 557, and note; *People v. Stuart*, 74 Mich. 411; 16 Am. St. Rep. 644, and note.

## BRANDON v. CARTER.

[119 MISSOURI, 572.]

**JURISDICTION, APPOINTMENT OF TRUSTEES.**—A trust will not be allowed to fail for want of a trustee, and therefore, where the trustee named refuses to act, another will be appointed to take his place.

**JURISDICTION, WHEN CONCURRENT.**—A statutory jurisdiction or remedy does not extinguish the ancient jurisdiction of the courts of equity over the same subject.

**TRUSTS.**—IN THE EVENT OF A VACANCY in the office of trustee, a court of equity has power to supply a trustee by appointment to assume the duties of such trust.

**TRUSTS.**—IF A TRUSTEE NAMED IN A WILL REFUSES TO ACCEPT the trust, the title to the trust property does not vest in him.

**TRUSTS—PARTIES TO SUIT FOR APPOINTMENT OF NEW TRUSTEE.**—If the complaint filed in a suit for the appointment of a trustee under a will alleges that the trustee designated in such will declines and refuses to act, and did not accept the trust, he is not a necessary party to the suit, because if such allegation is true, no title ever vested in him.

**TRUSTS.**—DISCLAIMER BY A PERSON NAMED AS A TRUSTEE may be established by his action, or by his nonaction long continued.

**TRUSTS.**—THE APPOINTMENT OF A TRUSTEE MADE AT THE INSTANCE OF A BENEFICIARY in place of one named in the will, on the ground that he refuses to act or accept such trust, cannot be collaterally attacked by a third person on the ground that the original trustee did not so decline or refuse to act, and was not a party to the proceeding by which the new trustee was appointed.

**A JUDGMENT IN A SUIT IN WHICH MINORS ARE PARTIES**, and in which they are not represented by their guardian, curator, or next friend as required by law, is not void if their father, who was their natural guardian, was also a party to such suit.

**JURY TRIAL.**—THOUGH AN ERRONEOUS INSTRUCTION IS GIVEN to a jury, a judgment will not be reversed nor a new trial granted if it appears that such instruction did not injure the party excepting to it.

**ACTION** of ejectment in which the plaintiff sued as trustee of John T. Jacobs and his children under the will of George R. Jacobs, deceased. The latter was during his lifetime the



owner of the property sued for, and by his last will named Robert Price as trustee of his property in trust for John T. Jacobs, one-fourth, and his children three-fourths, but to permit John T. Jacobs to live upon and cultivate the property without paying any rent therefor, if he should choose so to do. After making his will, George R. Jacobs signed a deed purporting to convey the property to his son, John T. Jacobs, but the delivery of this deed was denied by the plaintiff, and upon this issue the jury found in his favor. In November, 1887, in a proceeding brought by and in the name of John T. Jacobs and his children, it was alleged that Price, who was named as trustee in the will, had refused to accept that office, and the complainants therefore prayed for the appointment of some suitable person as trustee, and afterwards, in the same month, plaintiff was so appointed. To this proceeding Price was not a party. The title urged by the defendants was based upon a judgment and execution sale against John T. Jacobs. Verdict and judgment for the plaintiff.

*Gordon and Gordon and Odon Guitar, for the appellants.*

*C. B. Sebastian and Crews and Thurmond, for the respondent.*

SEE BARCLAY, J. A sufficient outline of the case is given in the preliminary statement.

1. The first assignment of error disputes the correctness of the ruling of the trial court touching the standing of the plaintiff as trustee under the will of Dr. George R. Jacobs.

By that will another person was originally named as trustee, but plaintiff was substituted in his stead by the action of the circuit court upon a proceeding for that purpose. That action defendants attack on the ground that Mr. Price, who was named as trustee in the will, was not a party to the proceeding.

By the statute of Missouri (Rev. Stats. 1889, sec. 6561) adopting the great body of the common law as part of our jurisprudence (so far as it is not repugnant to our local positive law), our courts are invested with certain general powers, sometimes called inherent, in respect of <sup>§§1</sup> certain topics, among which is that of trusts. These powers form an acknowledged part of the jurisdiction of our courts.

Among them is the power to appoint a trustee when a trust has been created by will, as in the case at bar, and for any cause there is need of a person to perform it, for it is a rule

of chancery jurisprudence, which has passed into a maxim; that a trust will never be allowed to fail for want of a trustee.

There is a statute providing for the summary appointment of trustees in certain states of fact (Rev. Stats. 1889, secs. 8683, 8684); but those sections do not by their terms purport to apply to trusts under wills.

Moreover, it is settled law in this state that a statutory jurisdiction or remedy does not extinguish an ancient jurisdiction of the courts of equity over the same subject, where there is nothing in the statute to indicate such a legislative purpose.

The circuit court, therefore, had jurisdiction, in case of a vacancy, to supply a trustee to assume the trust defined by the will of Dr. Jacobs in his devise for the benefit of his son and grandchildren.

But was there a vacancy? The petition of the beneficiaries alleged that there was, charging that Mr. Price had refused and declined to accept the trust. The court, acting on their allegations, necessarily must have found them to be true, by its order appointing plaintiff as trustee.

If there was a vacancy on account of Mr. Price's refusal to accept the trust (as stated in the petition), the title to the trust estate never vested in him. In that event he was not a necessary party to the proceeding for the appointment of the trustee to fill the place he had declined.

"If a bill should contain allegations which show that persons, who otherwise would ordinarily be <sup>582</sup> proper parties, have no interest in the controversy, and have no title to, and make no claim to, any interest, such allegations in the frame of the bill, if well founded, will dispense with the necessity of their being made parties": Story's Equity Pleading, 1892, 10th ed., sec. 214 a.

Our code sheds no light on this point, leaving the question, who are "necessary" parties, open for construction: Rev. Stats. 1889, sec. 1993.

Acceptance of a trust is necessary to the vesting of title in the trustee. It may often be implied or established by inference. But there is absolutely nothing before the court in the present case on which to base an inference that Mr. Price ever accepted the trust in question.

Disclaimer may be established by acts or by nonaction long continued: *Trask v. Donoghue* (1826), 1 Aiken, 370; *Matter of Robinson* (1867), 37 N. Y. 261; and, when found

by a competent court, dispenses with the necessity of making the disclaiming trustee a party to the proceeding to supply one.

Should a new trustee be appointed upon a false suggestion to the court, the original trustee, or any other interested person injuriously affected thereby, might, undoubtedly, proceed (by direct methods) to set the court right. But a regular appointment at the instance of beneficiaries certainly cannot be successfully attacked collaterally by one standing in the attitude of the present defendant, Mr. Carter. He claims no title derived through Mr. Price. His only right in the estate is as the purchaser of such interest as John T. Jacobs enjoyed as beneficiary. The latter was one of the petitioners for the appointment of a trustee.

We coincide, for the above reasons, in the opinion of the learned trial judge, that Mr. Price was not a necessary party to the proceeding in which plaintiff <sup>583</sup> was appointed trustee of this trust estate.

2. But it is then insisted that the proceeding is fatally defective, because the minors therein were not represented by any guardian, curator, or next friend, as required by law.

There are at least two answers to that proposition:

1. The father of these minors was their natural guardian: Rev. Stats. 1889, sec. 5279. He was joined with them as plaintiff, and was authorized (in the absence of any showing that they had a curator) to represent them in all legal proceedings: Rev. Stats. 1889, secs. 1997, 5298. The fact of this relationship appeared on the face of the petition for the appointment, and so there was a substantial compliance with the requirements of law.

2. Our statute of amendments declares that a judgment shall not be stayed or reversed (and for stronger reason can it not be avoided collaterally) on the ground that any party under twenty-one years of age appeared by attorney, if the verdict or judgment be for him: Rev. Stats. 1889, sec. 2113; *Robinson v. Hood* [1878], 67 Mo. 660.

Having thus considered all the objections to the validity of the appointment of plaintiff as trustee, we conclude that the trial judge was entirely correct in holding that appointment good against the collateral attack that has been made upon it.

3. The instruction for plaintiff as to the extent of the recovery is next challenged, because it is supposed to warrant a verdict for the full rental value of the premises, whereas it is

said that defendant, Mr. Carter, was at least entitled to one-fourth thereof as successor to the rights of John T. Jacobs under the will of his father.

'The instruction reads as follows: "The court instructs the jury that if they find for <sup>584</sup> the plaintiff, the measure of damages should be the rental value of the land from the seventh day of March, 1888, to the present time, not to exceed two thousand dollars, and the jury should find for the monthly rents, not exceeding one hundred dollars per month."

It may be that this language is susceptible of the construction defendants seek to put upon it. But, on the other hand, the result leaves it very plain that the jury were not misled by it in the particular complained of, as will appear.

Along with it was another declaration by the court, given at defendants' instance, to this purport, viz: "The court instructs the jury that, under the pleadings and the evidence in the case, defendant is entitled to the possession of an undivided one-fourth of the land in question, whether the deed from Dr. Jacobs to John T. Jacobs was delivered or not, and the verdict, in no event, could be for plaintiff for more than three-fourths of the land." And the verdict of the jury is in these words: "We, the jury, find for the plaintiff as to the three-fourths of land described in the petition, and we assess the damages of plaintiff at the sum of twelve hundred dollars, and we further find the value of the monthly rents and profits of said three-fourths of said land to be thirty-three and one-third dollars."

The evidence as to rents and profits is not preserved for review. The bill of exceptions states that the plaintiff gave evidence tending to prove the issues on his part, and the defendants on their part. We must hence presume the verdict supported by sufficient testimony: *Johnson v. Long* (1880), 72 Mo. 210.

But, beyond that presumption, the verdict plainly indicates on its face that the jury found for plaintiff only for a three-fourths' interest in the property, and thus intended to and did give defendants the full benefit of the rule of recovery stated in their own <sup>586</sup> instruction. Hence there is no substantial ground for complaint by them in that branch of the case. Plaintiff does not complain of the defendants' instruction, so we need not inquire whether it was precisely accurate as defining his rights.

The verdict and judgment certainly conceded to defendants all they can justly claim on that point.

This court is not authorized to reverse a judgment on account of any error of the trial court which, in the result, was not prejudicial to the substantial rights of the adverse party on the merits: Rev. Stats. 1889, secs. 2100, 2303.

The assignments of error are not sustained.

The judgment should be, and is, affirmed.

BLACK, C. J., and BRACE, J., concur.

MACFARLANE, J., having been at one time of counsel, did not take part.

**TRUSTS—APPOINTMENT OF TRUSTEES.**—The law does not suffer a trust to fail for want of a trustee: *Pearson v. Concord R. R. Corp.*, 62 N. H. 537; 13 Am. St. Rep. 590; *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495. Equity will not permit a trust to fail for want of a trustee: *Moore v. Quince*, 100 N. C. 85.

**EQUITY—OUSTER OF JURISDICTION.**—When a court of equity has assumed jurisdiction over a particular case, it cannot be ousted therefrom simply because in the development of legal means redress becomes attainable at law: *Smithson v. Smithson*, 37 Neb. 535; 40 Am. St. Rep. 504, and note.

## CITY OF TARKIO v. COOK.

[120 MISSOURI, 1.]

**MUNICIPAL ORDINANCE, VOID IN PART.**—A municipal ordinance having provisions, some of which are constitutional and others not, may be enforced as to the parts not in conflict with the organic law.

**MUNICIPAL ORDINANCES.**—A CONSTITUTIONAL PROVISION THAT NO BILL SHALL CONTAIN MORE THAN ONE SUBJECT, which shall be clearly expressed in its title, has no application to municipal ordinances.

**MUNICIPAL ORDINANCE THE ENACTING CLAUSE OF WHICH DOES NOT CONFORM TO THE REQUIREMENTS OF THE STATUTE** is not for that reason void.

**A MUNICIPAL ORDINANCE PROVIDING THAT NO BILLIARD-HALL SHALL BE KEPT OPEN**, nor shall any tables therein be used for playing games thereon after nine o'clock in the evening, is valid, if by statute the municipality enacting it has been given power to pass such ordinances as may be expedient to maintain peace and good government, and the good health and welfare of the city, and to regulate billiard-tables on which games are played for amusement.

**MUNICIPAL CORPORATIONS HAVE AN IMPLIED POWER TO PASS ORDINANCES AND BY-LAWS REASONABLE IN CHARACTER**, and not inconsistent with their charters nor with the general principles of the law of the land.

**MUNICIPAL ORDINANCES MAY BE DECLARED VOID BY THE COURTS** on the ground that they are unreasonable.

**MUNICIPAL CORPORATIONS AND ORDINANCES.—KEEPERS OF BILLIARD-TABLES** are not recognized by the statute as exercising a useful occupation, and each municipality may therefore determine for itself to what regulations they shall be subjected. Therefore, an ordinance providing that billiard-halls shall not be kept open after nine o'clock at night is valid.

**MUNICIPAL CORPORATIONS, PENALTIES WHICH MAY IMPOSE.—**Under a statute authorizing a city to pass ordinances for enforcing its police regulations, by imposing a fine not exceeding one hundred dollars for each violation, an ordinance imposing a fine of not less than thirty-five dollars nor more than one hundred dollars, is within the limits of the authority thus conferred.

**JURY TRIAL—PRACTICE.—MISCONDUCT OF THE COURT IN IMPANELING A JURY** is a matter of exception, and, unless saved by the exception, cannot be considered on appeal.

**EVIDENCE.—MUNICIPAL ORDINANCE** contained in a printed book in charge of the proper custodian, purporting to have been printed by authority of the city, is admissible in evidence without other proof under the statutes of Missouri.

*Hunt & Bailey, for the appellant.*

*Lewis & Ramsay, for the respondent.*

• **MACFARLANE, J.** After an appeal from the mayor's court of the city of Tarkio, and upon a trial in the circuit court, defendant was convicted of the violation of an ordinance of said city, and the payment of a fine of twenty-five dollars adjudged against him, from which he appealed to this court, on the ground that said ordinance was in violation of section 28, article 4, of the constitution of the state.

1. The ordinance was entitled "An ordinance to regulate billiard-halls, and to regulate, levy, and collect license on billiard and other tables upon which games are played for amusement, and to prohibit gambling therein." The sixth section, upon which defendant was convicted, required that no billiard-halls should be kept open, nor should any tables therein be used for playing games thereon, after nine o'clock in the evening.

Defendant was charged also with violating other independent sections of the ordinance, but as there was no conviction under them, their provisions need not be considered. If section 6 is constitutional and valid, it could be enforced, though all the remaining sections of the ordinance were void: *St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44; 58 Am. Rep. 82; *State v. Clarke*, 54 Mo. 17; 14 Am. Rep. 471.

2. The constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title" (Const., art. 4, sec. 28), of which, it is claimed, the

ordinance in question is violative, was intended to apply only to state legislation, and has no application to ordinances of this city. The article treats exclusively of the legislative department of the state, and the first section declares: "The legislative power, subject to the limitations herein contained, shall be vested in a senate and house of representatives, to be styled 'the general assembly of the state of Missouri.'" Municipal legislation is thus clearly excluded: 1 Dillon on Municipal Corporations, sec. 47.

Under authority of the constitution the legislature has provided, by general law, for the organization of cities and towns, and to that law we must look to ascertain the powers conferred, and the manner in which they may be exercised. Under this law we find no requirement that the title to an ordinance shall conform to the requirements of the constitution relating to legislative bills; indeed, we find no requirement or direction on the subject.

3. In the next place it is insisted that the enacting clause of the ordinance does not conform to the requirements of the statute. This objection does not, <sup>8</sup> in our opinion, invalidate the ordinance. It has been held by this court, and is well-settled law, that a city ordinance would not be void in consequence of the enacting clause not following the prescribed form, the charter being silent as to the effect of such irregularity: *St. Louis v. Foster*, 52 Mo. 514; Dillon on Municipal Corporations, sec. 309; *Tipton v. Norman*, 72 Mo. 381. These cases are decisive of this one.

4. The ordinance is also attacked as being unauthorized by the charter. This objection cannot be sustained. Power is not only given, generally, to pass such ordinances as may be expedient to maintaining the peace and good government, health, and welfare of the city, but expressly to regulate "billiard-tables" on "which games are played for amusement": Rev. Stats. 1889, sec. 1589. There can be no doubt under this authority the city had the power to pass an ordinance relating to and regulating not only the tables upon which the game of billiards is played, but also the halls or rooms in which they are kept and used.

5. It is insisted also that the ordinance should not be enforced, because it is unreasonable, oppressive, discriminating, and in derogation of common right. This objection is urged with much earnestness, and merits thoughtful consideration, as doubtless most cities of the fourth class have adopted



and are enforcing ordinances on the same and kindred subjects.

On the subject of general powers of municipal corporations to adopt by-laws, Judge Dillon says: "In England the subjects upon which by-laws may be made were not usually specified in the king's charter, and it became an established doctrine of the courts that every corporation had the implied or incidental right to pass by-laws; but this power was accompanied with these limitations, namely, that every by-law must be reasonable, and not inconsistent with the charter of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. In this country the courts have often affirmed the general incidental power of municipal corporations to make ordinances, but have always declared that ordinances passed in virtue of the implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of the state: 1 Dillon on Municipal Corporations, sec. 319, pp. 395, 396.

Charters of cities are grants of power under which alone they are authorized to legislate. All ordinances must, therefore, rest upon powers either expressly granted or reasonably incident to such as are granted, and which are essential to the purposes of the corporation. But there must not only be power, but the manner of its exercise, if not expressly provided, must be reasonable, and in harmony with the general laws of the land. Hence it is held the ordinances are subject to revision by the courts, not only in respect to whether the corporation had power to pass them, but also in respect to whether a general or implied power, if it existed, was exercised reasonably: *St. Louis v. Weber*, 44 Mo. 547; *Cape Girardeau v. Riley*, 72 Mo. 221; *St. Louis v. Bell Tel. Co.*, 96 Mo. 631; 9 Am. St. Rep. 370.

It by no means follows that the municipal authorities of a city have no discretion as to the manner in which the powers conferred shall be exercised. Indeed, the largest discretion is given them, unless expressly restricted by the charter; and an ordinance which is within the limits of the powers conferred will not be declared void, unless very clearly repugnant to some principle of common right.

Cities of the fourth class are given power to regulate,<sup>10</sup> and

levy and collect, a license tax on many trades and occupations as well as amusements: Rev. Stats. 1889, sec. 1589. It is very clear that those exercising useful trades and occupations do not occupy the same relation to society as those engaged solely in giving amusement to the public, and a much larger discretion should be given in regulating the latter than the former.

Keepers of billiard-tables are not recognized by the state as exercising a useful occupation. They are subjected to police regulation by the state, and by cities under powers granted them by the state: Rev. Stats., c. 16. They are prohibited from allowing minors to play upon their tables: Rev. Stats., sec. 715. Villages may prohibit them altogether: Rev. Stats., sec. 1672. Public billiard-halls are regarded by many as vicious in their tendencies, leading to idleness, gambling, and other vices. Each municipality can best determine for itself to what regulations they should be subjected, and, unless an ordinance fixed hours for their use which were in effect prohibitory, the courts should not interfere with the discretion exercised. We cannot say that the ordinance in question, in requiring billiard-halls to be closed at nine o'clock in the evening, is unreasonable, or in derogation of any common right: 1 Dillon on Municipal Corporations, sec. 400.

6. Section 1589 authorizes the city to pass ordinances for enforcing its police regulations, by imposing a fine of not more than one hundred dollars for their violation. The ordinance in question imposes a fine of not less than twenty-five dollars and not more than one hundred dollars for its violation. It will be seen that the penalty is within the limits of that prescribed by the charter. A similar case was considered by the supreme court of New Jersey, in which it was held that "where the legislature has defined the delegated powers, and prescribed with precision the penalties that may be imposed, an ordinance within the <sup>11</sup> powers granted, prescribing a penalty within the designated limit, cannot be set aside as unreasonable": *Haynes v. Cape May*, 50 N. J. L. 57.

An interference with the action of the city of Tarkio, in prescribing the penalty for the violation of this ordinance, would set at naught the authority of the legislature to delegate the power, and to prescribe the limit to the penalties that might be imposed. If the authority had been granted in general terms to impose a fine without fixing its limit, the courts might inquire into the reasonableness of that fixed by

the ordinance; but no such inquiry should be made where, as in this case, the maximum of the fine imposed is within the prescribed limits of the charter.

7. Objection was made to the competency of a juror, summoned on the panel, on the ground that he belonged to an association called the "Law and Order League," the purpose of which was to prosecute persons for violation of the law. The objection first appears on this record in the motion for a new trial, though it is there stated that the juror had declared his connection with such society on the examination as to his qualification. It does appear, moreover, that this juror was not one of the twelve who tried the cause.

In order to secure a review of the action of the trial court on this question the juror should have been challenged, if incompetent, at the time of his examination, and an exception then taken to an adverse ruling of the court. The objection comes to this court without other verification of the alleged ground of incompetency than the mere statement in the motion. This is not sufficient to authorize a consideration of the question on appeal. Misconduct of the court in impaneling a jury is a matter of exception, and unless such exception is saved the errors will not be considered on appeal: *State v. Brewer*, 109 Mo. 652; *State v. Hayes*, <sup>12</sup> 81 Mo. 574; *Easley v. Missouri Pac. Ry. Co.*, 113 Mo. 236.

Whether the juror was incompetent, for the causes alleged, is not decided.

8. The ordinance contained in the printed book, which was in charge of the proper custodian, purporting to have been published by authority of the city, and to contain its ordinances, was admissible in evidence without other proof: Rev. Stats. 1889, sec. 4846; *Tipton v. Norman*, 72 Mo. 381.

Other minor questions have been discussed by counsel, all of which have been considered, but we find no error justifying a reversal of the judgment, and it is affirmed.

All concur.

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**MUNICIPAL CORPORATIONS—ORDINANCES VOID IN PART.**—When a municipal ordinance is good in part and void in part it is only necessary, in order to maintain the ordinance, that the valid and invalid parts be so independent that the invalid may be eliminated, and what remains contain all the essentials of a complete ordinance: *Detroit v. Fort Wayne etc. Ry. Co.*, 95 Mich. 456; 35 Am. St. Rep. 580, and note; *Magneau v. City of Fremont*, 30 Neb. 843; 27 Am. St. Rep. 436, and note; *Poyer v. Village of Des Plaines*, 123 Ill. 111; 5 Am. St. Rep. 494; but an ordinance void in part is void altogether where all of its parts are connected and essential to each other: *State v. Helber*,

107 N. C. 962; 22 Am. St. Rep. 920; *Jacksonville v. Lehigh*, 26 Fla. 163; 22 Am. St. Rep. 558.

**MUNICIPAL CORPORATIONS—PASSAGE OF ORDINANCES.**—Constitutional provisions relating to the title of laws passed by the legislature do not apply to city ordinances: *People v. Wagner*, 86 Mich. 594; 24 Am. St. Rep. 141; *State v. Boncil*, 42 La. Ann. 1110; 21 Am. St. Rep. 413, and note.

**MUNICIPAL CORPORATIONS.—GENERAL POWER TO PASS BY-LAWS AND ORDINANCES:** See the note to *Magneau v. City of Fremont*, 27 Am. St. Rep. 445, and the extended note to *Robinson v. Mayor*, 34 Am. Dec. 629.

**MUNICIPAL CORPORATIONS—ORDINANCES MUST BE REASONABLE.**—Ordinances passed by the governing body of a city must be reasonable and not inconsistent with the laws of the state: *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175. This question is fully discussed in the note to *People v. Armstrong*, 16 Am. St. Rep. 584, and the extended notes to *Ward v. Mayor*, 35 Am. Rep. 702, and *Robinson v. Mayor*, 34 Am. Dec. 633. See, further, the recent cases of *Phillips v. City of Denver*, 19 Col. 179; *ante*, p. 230, and *Steffy v. Monroe City*, 135 Ind. 466, *ante*, p. 436, and note.

## HICKMAN v. CITY OF KANSAS.

[120 MISSOURI, 110.]

**MUNICIPAL CORPORATIONS—GRADING STREETS, DAMAGES FOR.**—If property is damaged by establishing the grade of a street, or by raising or lowering a grade previously established, compensation is recoverable therefor under a constitution declaring that private property shall not be taken or damaged for public use without just compensation.

**CONSTITUTIONAL PROVISION, WHEN SELF-ENFORCING.**—The provision in the constitution providing that private property shall not be taken or damaged for public use without just compensation is self-enforcing. Any party injured may resort to any common-law action which will afford him adequate and appropriate means of redress.

**STATUTORY REMEDIES, WHEN CONCURRENT AND WHEN EXCLUSIVE.**—If a statute gives a remedy in the affirmative without containing any express or implied negative for a matter which was actionable at the common law this does not take away the common-law remedy. The statutory remedy will be regarded as concurrent. But when a new right or the means of acquiring it are given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy.

**A STATUTORY REMEDY CANNOT BE MADE EXCLUSIVE BY THE LEGISLATURE** as against a party who has a right to redress under the constitution of the state, unless such statutory remedy is commensurate with the constitutional right and the remedies to which, by force of the constitution, he was entitled for his protection.

*F. F. Rozzelle, W. S. Cowherd, James Black, R. W. Quarles, and W. A. Alderson*, for the appellant.

*Scarritt & Scarritt, and Karnes, Holmes & Krauthoff*, for the respondent.

**114** BRACE, J. This is an action commenced in the circuit court of Jackson county for damages to plaintiff's property occasioned by a change of the grade of Ninth street in said city, in which the plaintiff obtained judgment for one thousand dollars, from which the defendant appealed to the Kansas City court of appeals, and the case was certified here, under the constitutional amendment as involving the decision of a constitutional question.

Plaintiff's property, which he claims was damaged by the action of defendant, abuts on Ninth street. Previous to the extension of the city limits in 1885 Ninth street was a county road, which had been graded and used as such for many years, both sides of which, in the vicinity of plaintiff's property, had been built up with residences and stores for a considerable distance beyond the city limits. The plaintiff bought his property in 1883, and the next year built upon and improved it with reference to the then existing grade. In October, 1884, the Kansas City and Independence Railway Company obtained the consent of the county court to build and operate a cable street railway on said road or street, the court in its order providing that the company should build its line of railway upon the grade of the street as then maintained, and should in no wise **115** disturb the surface of the street in such manner as to impair its usefulness, or prevent the flow of water along and across the same. In the latter part of 1885 the limits of the city were extended so as to take in that part of said road or street in front of plaintiff's property.

By ordinance approved April 15, 1886, the city changed the grade of said street in front of plaintiff's property to the present established grade, which raised the grade in front of said property about three and one-half feet. In the mean time all the rights and franchises of the Kansas City and Independence Railway Company, who had never availed themselves of the privilege aforesaid granted by the county court, passed to the Kansas City Cable Railway Company, which latter company, soon after the passage of said ordinance, constructed the line of road on the grade established by said ordinance, filling in the street in the center thereof up to said grade to the width of about twenty or twenty-two feet. Afterwards the city, under an ordinance approved November 19, 1886, filled up and graded the street, on each side of this road-bed, to the full width of the street (fifty feet).

The evidence tended to show that after the railroad company

constructed its road, and before the city finished the grading, the street in front of plaintiff's property was left in such a condition as to render it impassable, and to necessitate the completion of the grading by the city; that the raising of the grade necessitated the filling in of plaintiff's lot, the raising of his house and other structures, and the readjustment of all his improvements to conform to the established grade at a cost of about one thousand dollars.

The court, after refusing certain instructions asked by defendant, among them two instructing the jury that on the the pleadings and evidence the plaintiff could <sup>116</sup> not recover, submitted the case to the jury on other instructions which will be noted as far as necessary in the course of the opinion.

1. By the constitution of 1875 it is provided: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested": Const., art. 2, sec. 21.

Prior to the adoption of the constitution of 1875 (although the doctrine was vigorously attacked in *Thurston v. City of St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463, in the opinion by Judge Adams), it was uniformly held that any damage resulting to an abutting property owner from a change of grade was *damnum absque injuria*, for which the municipality was not liable, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done: *St. Louis v. Gurno*, 12 Mo. 415; *Taylor v. St. Louis*, 14 Mo. 23; 55 Am. Dec. 89; *Hoffman v. St. Louis*, 15 Mo. 656; *Schattner v. City of Kansas*, 53 Mo. 162; *Imler v. Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Wegmann v. City of Jefferson*, 61 Mo. 55; *Swenson v. Lexington*, 69 Mo. 157; *Stewart v. Clinton*, 79 Mo. 603.

To uproot this doctrine, and provide for compensation when property is damaged, as well as when it is taken for public use, the eminent domain clause in the constitution of 1865 was amended by the constitution of 1875, to read as quoted, and since it has been considered the settled law in this state that "when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street pre-

viously <sup>117</sup> established, it is damaged for public use within the meaning of the constitution": *Werth v. Springfield*, 78 Mo. 107; *State v. City of Kansas*, 89 Mo. 34; *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City etc. Ry. Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Gibson v. Owens*, 115 Mo. 258.

It is also well-settled law that this article of the constitution gives an absolute right, and is self-enforcing, and although the legislature may have enacted no law providing a mode for the ascertainment and payment of the compensation provided for, resort may be had by the party entitled to the right to any common-law action which will afford him adequate and appropriate means of redress: *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City etc. Ry. Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Keith v. Bingham*, 100 Mo. 300.

2. The defendant's first contention is, that this action commenced on the nineteenth day of September, 1887, is not maintainable; for the reason that by a law then in force, being an act entitled "An act to provide for the ascertainment of, and payment for, damages done by municipal corporations to private property for public use, as directed by section 21 of article 2 of the state constitution," approved March 26, 1885 (Sess. Acts, 1885, p. 47), amended by an act approved March 31, 1887 (Sess. Acts, 1887, p. 37), provision was made for the recovery of damages in cases like the one in hand, and that by section 8 thereof it was provided that "the above proceedings shall be exclusive of all other remedies in the courts of this state for the recovery, from any municipal corporation, of damages done to private property for public use within the meaning of section 21 of article 2 of the state constitution." The rule is, that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common-law remedy, <sup>118</sup> but the party may still sue at common law, as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative. But where a new right or the means of acquiring it are given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy: *State v. Bittinger*, 55 Mo. 596; *Lindell's Admx. v. Hannibal etc. R. R. Co.*, 36 Mo. 543; *Soulard v. St. Louis*, 36 Mo. 546.

As we have seen the right which plaintiff had in this case was not a common-law right; it was a new right, not a statu-



tory right, strictly speaking, but a constitutional right, to have his damages ascertained and paid to him or into court for his use before his property was disturbed. Unquestionably the legislature might have provided a mode of procedure for ascertaining and paying the owner his damages, under the constitutional provision giving the right that would have been exclusive, but the act of 1885-87 did not undertake to enforce this constitutional right. Its whole scope was an attempt to provide a remedy for its invasion. The constitution *ex propria vigore* had already provided the owner remedies through the courts of its creation for the protection of that right. These courts were at all times open to him either to restrain the municipality from damaging the property until compensation therefor is ascertained and made: *Gates v. Kansas City Bridge etc. Co.*, 111 Mo. 28; or, having damaged it, to compel the municipality to respond with the amount thereof ascertained by such courts in a constitutional manner: Cases cited *supra*.

While it may be conceded that it was in the power of the legislature to provide an exclusive special remedy for determining the compensation for property damaged within the meaning of the constitution, and for securing the payment thereof to its owners, yet <sup>119</sup> such remedy, in order to be exclusive, must be commensurate with the constitutional right, and the remedies which by force of the constitution the owner is entitled to for its protection. The mere declaration of the legislature could not make the remedy provided by the act a substitute for the remedies to which the owner was entitled under the constitution, unless in point of fact it was an adequate substitute. Leaving out of view, entirely, the injunctive remedy, by which the owner's constitutional right to have his compensation measured and paid before the damages were inflicted, and for which the statute of 1885-87 undertook to substitute no remedy whatever, was the proceeding therein provided for him to obtain compensation for the damages suffered an adequate substitute for the remedy afforded him by an action for such damages under the constitution independent of the statute?

In view of the fact that section 8, which contains the legislative declaration aforesaid, was left out in the revision of 1889, and the exclusive character of the act removed by a new section (Rev. Stats. 1889, sec. 1821), it will be necessary to point out only one or two particulars, in which the enactment

failed to come up to the measure of an adequate substitute for the owner's remedy under the constitution. The act does not give the owner the right of initiating the proceeding or process, or other means of obtaining payment after the amount of his damages has been ascertained. It is true the original act did provide that the application to the circuit court for the ascertainment of the amount of damages by petition might be made, "either by the city authorities or the owner of the property for which damages are claimed," but the amendment of 1887 (page 38) required that, before the filing of such petition, the city authorities must first define a benefit district. It is also true that section 7 of the original act did provide <sup>120</sup> for execution against the municipality in the event that damages were not paid within six months after they were finally ascertained by the court, but this section was repealed in the amended act (page 39). Thus the owner was left without the power of initiating the statutory proceeding for the ascertainment of his damages, and without process to compel their payment after they were ascertained, and, although the plaintiff in this case, by reason of the fact that no benefit district was ever defined by the defendant, was deprived of the poor privilege of testing its efficacy for his relief, yet this statute is invoked to defeat his action, secured to him by the organic law of the state. That under it the city might have had the plaintiff's damages ascertained might be conceded, but having failed to do so, and to provide the means to pay the same, it cannot be permitted to interpose this statute, and its own neglect to defeat his action: *Elgin v. Eaton*, 83 Ill. 535; 25 Am. Rep. 412; *Lafayette v. Wortman*, 107 Ind. 404; *Jamison v. Springfield*, 53 Mo. 224.

3. It is next contended that, as the effect of the ordinance establishing the grade of Ninth street was for the first time to raise the grade above the natural surface, the defendant is not liable for any damage that may have resulted from the establishment of such grade, and in support of this contention Dillon on Municipal Corporations and some cases from our sister states are cited in support of the doctrine favored by the learned author in section 995 b, fourth edition of his valuable work, where he says: "It seems to us that, on principle, the mere provision of the constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and

ordinary <sup>121</sup> improvement for street purposes proper, to a grade line for the first time established."

The instruction of the court on this subject was in harmony with what has been understood to be the Missouri doctrine as announced and recognized in the cases cited *supra*, that the municipality is liable for damage occasioned by establishing a grade as well as for damage occasioned by raising or lowering a grade previously established. In *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180, *ante*, p. 648, in division number one, the precise question was presented, and, after mature consideration of the subject and a discussion of the authorities, the conclusion of that division of the court was expressed by Macfarlane, J., as follows: "We are of the opinion, therefore, that the rule which allows compensation for consequential damages to property, caused by a material change of grade from the natural surface, is the most equitable to the property owners, and best conserves the public interest, and this rule is generally adopted under similar constitutional provisions" (citing cases from other states), to which may be added *Groff v. Philadelphia*, 150 Pa. St. 594.

Without going over this ground again it is sufficient to say that we adhere to the doctrine as it has hitherto been recognized by this court, and so recently and directly expressed in *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180, *ante*, p. 648, and hold that the court committed no error in predicating a right of recovery thereon.

4. It is next urged that the court committed error in the instructions on measure of damages, which were, in substance, that the plaintiff should be allowed such a sum as would compensate him for the damage sustained by him by reason of the grading of the street in front of his premises, less any special and peculiar benefits to the property resulting from such grading, <sup>122</sup> in which, however, was not to be included general benefits shared in common with other property in the same neighborhood. It is insisted for appellant that the true measure of damages in such cases is the difference between the value of the property before and the value after the change of grade, a rule that would charge the owner with general, as well as special, benefits, and which has received the support of the courts in some of the states, as appears by the cases cited in the brief of counsel for appellant.

When the constitution of 1875 was adopted it was settled law in this state that in adjusting the compensation to be

made to owners of land taken for public use, the benefit to be deducted from the damage which the owner sustained by such taking is the direct and peculiar benefit that would result in particular to the owner's land not taken, and not the general benefit that such land would derive in common with the land of other owners in the neighborhood from the public use for which it was taken: *Newby v. Platte Co.*, 25 Mo. 258; *Louisiana Plank Road Co. v. Pickett*, 25 Mo. 535; *Pacific R. R. Co. v. Chrystal*, 25 Mo. 544; *St. Louis etc. R. R. Co. v. Richardson*, 45 Mo. 466; *Lee v. Tebo etc. R. R. Co.*, 53 Mo. 178; *Quincy etc. R. R. Co. v. Ridge*, 57 Mo. 600; *Hosher v. Kansas City etc. R. R. Co.*, 60 Mo. 303.

In the decision of these cases the constitutional provision applied read: "That no private property ought to be taken or applied to public use without just compensation": Const. 1820, art. 13, sec. 7; Const. 1865, art. 1, sec. 16. While a slight change in the phraseology was made in the constitution of 1875, the only change in the meaning was affected by inserting the word "damaged" and coupling it with the word "taken," and thereafter "just compensation" was to be made for property "damaged," as theretofore it had been made for property "taken." The <sup>123</sup> compensation for property damaged was made just as broad, and no broader, than compensation for property taken. The standard for the measurement of the one had been already settled by judicial action, and by the same standard is the other to be measured under the constitution of 1875. In the language of Brewer, J., in *McElroy v. Kansas City*, 21 Fed. Rep. 259: "The damage to property is placed upon the same basis as the value of property taken, and neither can be done without compensation first made. In other words, uniting 'property damaged' with 'property taken' in the same clause and subject to the same prohibitions, places them in the same category as to judicial action. . . . When the constitutional convention met, the rule of protection against the taking of private property had long been settled, and must have been familiar. It did not attempt to prescribe two rules. It did not even make two enactments, but simply added 'property damaged' to 'property taken'; and for the courts to now hold that under the same language two rules were prescribed, is to create a distinction which has no just foundation, and would be mere judicial legislation."

In the course of the establishment by this court of the rule

in regard to the benefit to be taken into consideration in determining the compensation to be made to the landowner, and since, it has from time to time been noted in the opinions that a different rule obtained in some other jurisdictions. But this court has consistently maintained its position from the beginning through a long line of decisions down to the present day: *Wyandotte etc. Ry. Co. v. Waldo*, 70 Mo. 629; *Combs v. Smith*, 78 Mo. 32; *Allen v. Wabash etc. Ry. Co.*, 84 Mo. 646; *Springfield etc. Ry. Co. v. Calkins*, 90 Mo. 538; *Daugherty v. Brown*, 91 Mo. 26; *Kansas City etc. R. R. Co. v. Story*, 96 Mo. 611; *McReynolds v. Kansas City etc. Ry. Co.*, 110 Mo. 484; *Ragan v. Kansas City etc. Ry. Co.*, 111 Mo. 456; *Spencer* 124 v. *Metropolitan St. Ry. Co.*, 120 Mo. 154; *Kansas City v. Morton*, 117 Mo. 446.

These cases show that the rule obtains and has been applied in the same manner regardless of the character of the public use for which the property of the owner was taken or damaged, whether for the purposes of a railroad, a county road, or a street. It has, in fact, become a fundamental rule, universally recognized by the legislature, by the courts, and the people, in the measurement of damages sustained by a landowner for the public benefit.

We have heretofore been urged to make a distinction in the measure of damages between cases where the land of the owner was appropriated and damaged, without being previously condemned for public use, and when the damages were to be ascertained in such proceedings; but the court would have none of it, replying that "the damage was the same, and the compensation should be the same": *McReynolds v. Kansas City etc. Ry. Co.*, 110 Mo. 484; *Ragan v. Kansas City etc. Ry. Co.*, 111 Mo. 456; *Doyle v. Kansas City etc. Ry. Co.*, 113 Mo. 280.

We have also been pressed to make a distinction between a case in which a part of a tract of land is taken, and one in which the tract is damaged only, it being insisted that in the latter case the damage would only be the diminution in the actual pecuniary or market value, to obtain which all benefits, whether general or special, would have to enter into the calculation. In *Kansas City v. Morton*, 117 Mo. 446, which was a proceeding to assess the damages which would result to an abutting proprietor from the grading of an alley, division number one, through Macfarlane, J., replied that, "While the rule has been thus declared in some of the states under

constitutional and charter provisions similar to ours, we do not think it consistent with our decisions. Our constitution secures to the property owner the right <sup>125</sup> to compensation when his property is damaged in the same terms as when it is actually invaded and taken. No reason is seen why the rule for assessing the benefits should be different." And in *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154, which was an action for damages to an abutting lotowner, division number two, speaking through Burgess, J., said: "While contrary opinions have been maintained with great ability in courts of others states, and by elementary writers of much distinction, the rule in this state is well established, that in cases of this kind, in estimating benefits, the jury should be restricted, in estimating such benefits, to peculiar and direct benefits, or increase of value, as result to the lots in controversy, in which other lots in the same locality do not participate."

It would be a work of supererogation to add any thing to what has been so well said in many of the cases cited in support of the justice and reasonableness of the Missouri rule on this subject, or to further show that the case in hand is within its principle. The rule is founded on the broad and equitable doctrine that every citizen should share the common benefits of a government whose common burdens he is required to bear; in the spirit of which axiom, while we maintain on the one hand that the abutting landowner whose property is damaged for the public use should have only such damages as are peculiar to his property; on the other hand, we maintain, as illustrated in the cases cited, that in ascertaining his damage it shall not be reduced by benefits other than those that are also peculiar to his property. The vitality of the rule, in either case, is to be found in its inherent equity, and furnishes a sufficient reason for its adoption and maintenance. The instruction of the court upon the measure of damages in the present case was in harmony with this rule, and therefore not erroneous.

<sup>126</sup> 5. The railroad company, under its license from the county, had authority to lay its track upon the road. When the city extended its limits it succeeded to the relation formerly sustained by the county to the road, and took municipal jurisdiction of the territory, subject to all rights acquired under its predecessor. When, thereafter, the city established the grade of the street, as it had the power to do, the only

way possible for the railway company to exercise its right was to lay its tracks in conformity to such grade. In bringing their roadbed to that grade for the purpose of laying their tracks they were simply obeying the command of the municipal government expressed by the ordinance. The damage for which plaintiff recovered was for the injury to his property, resulting from raising the grade in front of his property by the employees of the railroad company and those of the city in compliance with the requirements of that ordinance. The damage was the result of the exercise of the city's power, for which it is liable: *Sheehy v. Kansas City etc. Ry. Co.*, 94 Mo. 574; 4 Am. St. Rep. 896, and cases *supra*.

The *Sheehy* case is cited by counsel for appellant in support of the measure of damages for which they contend, but it is not at all in point for that purpose, and we know of no Missouri case that does give it support, except *Taylor v. Kansas City etc. Ry. Co.*, 38 Mo. App. 668; the ruling in which, upon that question, we do not approve.

The fact that the plaintiff, after the grading of its roadbed had been completed by the cable company, requested that the grading of the street might be finished, ought not to estop him from recovering damages for his injury. If any error is to be found in the instructions upon this issue it is in favor of the defendant.

<sup>127</sup> We find no error in the record calling for a reversal, and the judgment of the circuit court is affirmed.

All concur.

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MUNICIPAL CORPORATIONS.—DAMAGES FOR GRADING STREETS: See *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180; *ante*, p. 648, and note.

CONSTITUTIONS.—SELF-ENFORCING PROVISIONS: See the extended note to *County of Cook v. Industrial School*, 8 Am. St. Rep. 416, and *Willis v. Mabon*, 48 Minn. 140; 31 Am. St. Rep. 626.

STATUTORY REMEDIES—WHETHER EXCLUSIVE OR CONCURRENT. — The statutory remedy must be pursued where both the right and the remedy are given by statute; although if the right existed at common law, and a remedy is given by statute, the latter is regarded as cumulative, and either remedy might be pursued: *People v. Craycroft*, 2 Cal. 243; 56 Am. Dec. 331, and note. Where a new right is introduced by statute the statutory remedy is the one to be pursued, but where there is a pre-existing right at common law, and an affirmative statute inflicts a new penalty, the law is otherwise: *Lang v. Scott*, 1 Blackf. 405; 12 Am. Dec. 257, and note. Remedies are cumulative where the statute gives a remedy with a penalty, a previous common-law remedy existing: *Dybert v. Schenck*, 23 Wend. 445; 36 Am. Dec. 575. If a statute provides a remedy for a matter before actionable at common law the common-law remedy is not thereby divested: *Orittenden v.*



*Wilson*, 5 Cow. 165; 15 Am. Dec. 462, and note; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61; *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59, and note; *Dawson v. Miller*, 20 Tex. 171; 70 Am. Dec. 380, and note. See, also, the note to *Aldrich v. Chesire R. R. Co.*, 53 Am. Dec. 215.

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## GLOVER v. HENDERSON.

[120 MISSOURI, 367.]

**PLEADING QUANTUM MERUIT.**—A complaint which alleges a contract of employment between the plaintiff and the defendant, and the rendering of services and the expenditure of money under it, and that the plaintiff was wrongfully discharged, and the value of his services rendered, and the amount of his money expended, presents a cause of action in *quantum meruit*.

**PRINCIPAL AND AGENT, REVOCATION OF AGENCY, PRINCIPAL'S LIABILITY FOR.**—If there is an employment of an agent for a definite period of time, express or implied, and he is discharged without cause before the expiration of that time, the principal is answerable as for a breach of the agreement, and the agent may elect to treat the contract as rescinded and maintain an action for the value of services rendered and money expended.

**PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY TO SELL REAL PROPERTY, DAMAGES FOR.**—If the owner of real property appoints an agent to sell it, and agrees that he shall have a specified compensation for making sales, and further, that, if he sell the whole within a year, he shall be entitled to an additional compensation there is an implied agreement that he shall have a year in which to make the sales authorized, and he may recover the damages sustained from the revocation of his agency before the expiration of the year.

**PRINCIPAL AND AGENT—UNILATERAL CONTRACT BETWEEN.**—If an agent is appointed with power to sell certain property in parcels, and is, in addition to the compensation due on each sale, to have a further sum if he sells the whole thereof within a year, the fact that he does not agree to make such sales within a year or to give the whole of his time thereto does not justify the principal in revoking the authority, within the year, and thus depriving the agent of his power to earn the compensation agreed to be paid to him.

**EVIDENCE—VALUE OF SERVICES.**—In an action by an agent to recover the value of his services under an authorization to sell certain real property, which authorization was wrongfully revoked by his principal, evidence tending to prove what is usually charged for such services, and what, in the opinion of competent witnesses, such services were worth, is admissible.

**PRINCIPAL AND AGENT—DAMAGES, MEASURE OF FOR REVOCATION OF AGENCY.**—If the authority of an agent to sell specified real property is wrongfully revoked after he has performed services and made expenditures in good faith under it, the measure of his damages is the reasonable value of the services rendered, and the money fairly expended in performing such services.

**JURY TRIAL—INSTRUCTIONS.**—If in an action there is a counterclaim as well as a complaint and answer, and an instruction is asked respecting the burden of proof in its terms applicable to the whole case, it may be refused if it is correct with respect to the issue presented by the complaint only.

*Karnes, Holmes & Krauthoff*, for the appellant.

*E. W. Taylor, and Gage, Ladd & Small*, for the respondent.

**371** **BLACK, P. J.** Plaintiff brought this suit to recover the value of services rendered and expenses incurred in selling for defendant a large number of lots. The trial resulted in a verdict and judgment for the plaintiff for \$4,000, from which the defendant appealed.

Mr. Henderson, the defendant, owned a tract of 30 acres of land adjoining Kansas City, upon which there was an encumbrance of \$25,000. He laid the land off into an addition under the name of Round Top, so as to contain 280 lots, the lots in general having a front of 25 feet each. He had purchased the land on speculation, and became **372** exceedingly anxious to sell. With this end in view he and the plaintiff, Glover, a real estate agent, had frequent consultations. Early in 1890 they developed the following scheme for selling the lots: Each purchaser was to make a small cash payment, and monthly deferred payments of \$10 each, the deferred payments to be evidenced by notes. After the payment of a given number of notes the defendant was to execute to the purchaser a warranty deed, the purchaser securing the unpaid notes by deeds of trust upon the lot purchased. In this way sufficient cash was to be obtained to procure a release of the particular lot from the encumbrance. The deed constituting the encumbrance contained a clause to the effect that lots should be released from time to time upon the payment of a given sum per lot.

The defendant had made a declaration of trust in favor of Mr. Waller and Mr. Rhodes, whereby each became entitled to a one-fourteenth interest in the land. After the plan for selling the lots had been matured, the parties, including Waller and Rhodes, visited the addition and placed prices upon each and all of the lots, which varied from \$4 to \$22 per front foot. These prices were calculated and arranged so that all the lots would produce about \$80,000, that being the cost price of the property to the defendant, with interest added. The prices so fixed were noted on a plat called by Glover the net price plat. Each party kept a copy of this plat.

According to the evidence of the plaintiff the agreement finally made between him and the defendant was to the following effect: Plaintiff was to have the exclusive right to sell the lots. For his compensation he was to add \$1, \$2, \$3, or \$4 per front foot, as he saw fit, to the prices designated on the plat of net prices. The net prices with this addition <sup>373</sup> were to constitute the selling prices, for which cash and notes were to be taken. If plaintiff sold out the addition in one year he was to have an additional compensation or bonus of \$1,500 cash. The plaintiff was to pay the wages of all necessary employees, subagents, and the expenses of advertising out of his own pocket. The expenses of staking out the lots, clearing off, and sodding part of the land were to be paid by plaintiff in the first instance, but for all such expenses he was to be reimbursed out of sales made by him.

The defendant testified that the net price plat, as it is called by the plaintiff, was no more than a temporary statement of the prices, and that they were subject to change from time to time. He testified in direct and positive terms that plaintiff was to have \$1, and only \$1, per foot for selling the lots, and his evidence in this respect is supported by that of Waller and Rhodes. In other respects his evidence as to the terms of the contract is the same as the evidence of the plaintiff. All agree as to the \$1,500 bonus.

The plaintiff made up what he calls selling-plats, and caused a large number of them to be published and distributed. These plats designated the prices at which the lots would be sold, as a general rule, at \$2 per front foot in excess of the prices stated in the net price plat. Lots were sold, contracts made, and notes received on the basis of the prices thus stated on the selling plats. The evidence shows that plaintiff entered into the business with great energy and zeal. He advertised the property in almost every conceivable manner, placed an office and an agent on the land, and employed various subagents, paying them their commissions out of his own pocket as he had agreed. Between April and the last of August, 1890, he had sold 164 lots, that is to say, about 4,000 out of the 7,000 front <sup>374</sup> feet. These sales were reported to the defendant from time to time, the reports giving the prices according to the net plat; but it appears the defendant signed the contracts which set forth the true selling prices, and he had access to and saw the notes taken, so that it is clear he knew for what prices the lots were being sold. At the last-

named date a difference arose between the plaintiff and the defendant, the plaintiff claiming the right to take all notes in excess of the net plat prices, and the defendant claiming that plaintiff was entitled to a compensation of \$1 per foot only. This difference led to the discharge of plaintiff.

The foregoing is but an outline of the evidence found in the printed record of 500 or 600 pages, so far as it relates to the issues made by the petition and answer. The evidence relating to the counterclaims will be noticed hereafter. The chief disputed question of fact in the trial court was, whether the defendant was to have \$1 per foot, or whether he had a right to add to the net plat prices such sums as he saw fit for his compensation. The plaintiff's evidence and some circumstances support this theory of the contract, while the evidence of the defendant and that of Waller and Rhodes support the defendant's theory. This was, therefore, a question of fact for the jury to determine, and we deem it unnecessary to set out the evidence in detail, for there being evidence to support the verdict, the question of fact is not open to review here.

The plaintiff, in his petition, sets out the contract according to his version of it, and states that pursuant to it he sold lots to the amount of \$44,732, in notes and cash, being \$8,044 over the aggregate of the prices designated on the net price plat; that he has received in cash \$1,004, and in notes of purchasers, \$4,004; that, though he was ready and willing to continue to <sup>375</sup> act for the defendant as his agent, the defendant refused to allow him to make any further sales. He then states that he has expended the sum of \$1,317.42 in advertising the addition for sale, and performed work and services in and about selling the lots of the value of \$12,000, and asks judgment for \$13,317.42, less \$5,008, received in cash and in notes.

The defendant, in his answer, states that "he employed plaintiff to act for him in the sale of lots in said addition, so long as the defendant might desire to continue said employment and sale," and this is followed by a general denial.

From the instructions given, the jury must have found that the contract between plaintiff and the defendant was the same in its terms as testified to by the plaintiff, as we have before stated his evidence; that up to the 1st of September, 1890, the plaintiff carried out the terms of the contract on his part, and was ready to go on with it; that defendant then refused and declined to allow the plaintiff to sell any more lots. The jury allowed plaintiff the reasonable value of his

services, including moneys expended to the extent that the outlays were reasonable and necessary in the performance of his duties.

1. The first question is whether this action is *quantum meruit* for services rendered and reasonable expenses incurred, as claimed by the plaintiff; or whether it is an action for damages for breach of contract. That the petition declares upon *quantum meruit* we think there can be no doubt. It is true the petition sets out the contract of employment, and shows that services were rendered and moneys expended in the execution of it; but it proceeds to aver that defendant wrongfully discharged the plaintiff, and then states the value of the services rendered and moneys expended, and prays judgment therefor, less the <sup>276</sup> amount received. Had the plaintiff declared for the value of his services, saying nothing about the contract, and to this the defendant had answered by setting up the special contract according to his version of it, and the plaintiff had replied by setting out the contract according to his theory of it, and alleged that the defendant wrongfully revoked the agency, because of which he demanded the value of his services up to the date of his discharge, the issues would have been in substance the same that they are under the present pleadings. It is the theory of our code that the plaintiff must state the facts constituting his cause of action. If he proposes to treat the contract as rescinded, and recover for the value of services rendered, as he may do under certain circumstances, there is no reason why he may not set out the contract, the rendition of services thereunder, the wrongful termination of the contract by the defendant, and then declare for the value of the services rendered. Such is the plaintiff's petition in this case, and it is clearly a declaration upon *quantum meruit*: *Ehrlich v. Aetna Life Ins. Co.*, 88 Mo. 249.

2. The contract in question was one of agency, so that we are brought to the question whether defendant, having revoked the agency, is liable to the plaintiff for the value of services rendered and expenses incurred up to the date of revocation.

There is and can be no claim made in this case that plaintiff had conferred upon him a power coupled with an interest. And as he had no interest in the subject matter of the agency, the principal had the power, and, in a qualified sense, the right, to revoke the agency at his will: *State v. Walker*, 88 Mo. 279; *Mechem on Agency*, sec. 204. But the question of

the liability of the principal to the agent for services rendered is another and a different thing from the power, or even right, to terminate the agency. Contracts <sup>377</sup> of agency are numerous and widely variant in their objects, purposes, and terms; so that the question of compensation of the agent, when the agency has been revoked by the principal, will depend upon a variety of circumstances. It is laid down by a recent text-writer that "the mere fact that an agent is employed to perform a certain act will not, of itself, amount to an undertaking on the part of the principal that the agent shall be permitted to complete the act, at all events, and the principal may fairly, and in good faith, revoke the agency without liability, at any time before performance." But "where an agent is employed to perform an act which involves expenditure of labor and money, before it is possible to accomplish the desired object, and after the agent has in good faith incurred expense and expended time and labor, but before he has had a reasonable opportunity to avail himself of the results of this preliminary effort, it could not be permitted that the principal should then terminate the agency and take advantage of the agent's services without rendering any compensation therefor": Mechem on Agency, sec. 620. This is good sense, and, we believe, good law.

But there is still another well-settled and more specific rule which will determine this branch of this case, and that is this: Where there is an employment for a definite period of time, expressed or implied, and the agent is discharged without cause before the expiration of that period, the principal will be liable to the agent the same as in case of a breach of any other contract; and in such cases the agent may elect to treat the contract as rescinded, and bring an action to recover the value of his services and money expended: Mechem on Agency, secs. 614, 621; *Ehrlich v. Aetna Life Ins. Co.*, 88 Mo. 249; *Kirk v. Hartman*, 63 Pa. St. 97.

The contract between the plaintiff and the defendant, <sup>378</sup> as found by the jury, contains no express stipulation to the effect that the agency should continue for one year, but it contains the stipulation that the plaintiff should have an additional compensation of \$1,500 if he sold the lots within one year; and the question then is, whether there arises an implied agreement that he should have one year in which to sell the lots.

Although a contract on its face and by its terms appears to

an obligation on one party only, yet, if it was the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation: *Lewis v. Atlas etc. Ins. Co.*, 61 Mo. 534. But, as said in *Churchward v. Queen*, L. R. 1 Q. B. 195: "Where a contract is silent, the court or jury who are called upon to imply an obligation on the other side, which does not appear in the terms of the contract, must take great care that they do not make the contract speak . . . . contrary to what . . . . was the intention of the parties." The question after all is one of intention, to be gathered from the tenor and all the terms of the contract, considered in the light of the subject matter of which the contract treats.

The subject of the agency in question was one whole addition, consisting of 280 lots, and the plaintiff was to have the exclusive right to sell all of them. It is plain to be seen that the \$1,500 was an inducement to plaintiff to accept the agency. It was a part, and a considerable part, of the compensation which he was to receive. It is true this part of the consideration was conditional, that is to say, upon the fact that he sold the lots within one year, but the very condition shows that he was to have a year in which to perform it. His right to have a year in which to sell the lots is clearly implied, and this implied part <sup>379</sup> of the agreement is as certain and definite as if it had been stated in so many words. This conclusion seems to us irresistible.

Nor was it necessary to submit this question to the jury; for the jury found that the plaintiff was to have an additional compensation of \$1,500 if he sold out the lots within one year. The clear intendment and construction of this language is that he was to have a year in which to sell out the addition.

But it is said the plaintiff testified that he reserved the right to quit the work at any time, and hence the defendant had the corresponding right to terminate the agency at will, notwithstanding the agreement concerning the \$1,500. The plaintiff testified that he did not bind himself to sell the addition for \$80,000 within one year, or to pay a forfeiture if he failed to sell it. He states at one place in the lengthy examination that he did not bind himself to devote the entire year to the sale of Round Top, and could have quit at any time, but he was not that kind of a man. At another place he says he was bound to give his time and attention to the sale of the



land, and to try to sell it. He evidently undertook to make a reasonable effort to sell the lots. This much is implied in the terms of the agreement found by the jury to have been made by these parties. It is equally true that he was not bound, at all events, to continue his efforts during the entire year. But it does not follow that the defendant had the right to revoke the agency, without cause, at any time during the year. Says Mechem: "It is, in many cases, difficult to determine whether the parties have made a definite agreement for a fixed time or not. It is not indispensable that they should, in the first instance, be both bound for the same period. It may lawfully be made to rest with either party to determine, at his <sup>see</sup> option, that the agreement shall be one for a certain time": Mechem on Agency, sec. 211.

Such questions as this must be considered in the light of the nature and object of the agency, and the agreement which the parties have made. The defendant was anxious to dispose of the addition, and the scheme devised to sell it was problematical and doubtful. The defendant agreed, as we have seen, to give the plaintiff one year in which to earn, if he could, the extra \$1,500, and this agreement as to time is not void or unlawful because the plaintiff had the right, at his option, to abandon the contract before the expiration of the year. The fact that plaintiff had such right or option gave the defendant no right to terminate the agency before the expiration of the year, so long as the plaintiff was making diligent efforts to sell the lots.

3. As the plaintiff can maintain this action to recover the value of his services, and the reasonable expenses incurred by him, it follows that he had the right to produce evidence showing the value of such services. Evidence of what is usually charged for similar services at the same place was admissible. And it was also competent to show, by persons who were acquainted with the value of like services, what, in their opinion, the services of the plaintiff were worth. The witnesses called by the plaintiff for this purpose were real estate agents, and their evidence shows that they were fairly acquainted with the value of like services. The fact that commissions in like cases are generally regulated by contract, and the further fact that these lots were sold under what is called a unique and unusual plan, did not affect the competency of the evidence of these witnesses as to the value of the services rendered by the plaintiff. And it was also competent

to show what commissions had been paid in the same locality for selling other additions. The differences <sup>281</sup> between the plans adopted in making such other sales and the sales in question would be a matter for the jury to consider, but such differences do not affect the competency of the evidence. There was no error in the admission of evidence on this subject.

4. It follows, also, from what has been said, that the measure of the plaintiff's damages was the reasonable value of the services rendered and the moneys fairly expended in performing such services. The instructions as to damages proceed on this theory, and there is no error in them.

5. The defendant asked the court to give the following instructions, both of which were refused:

"1. The burden is on the plaintiff to show to the jury by the preponderance of the evidence in this case that the agreement between him and the defendant was for a greater compensation than a commission of one dollar per front foot.

"2. The burden of proof is on the plaintiff to prove to the jury by the preponderance of credible evidence in this case that the agreement between him and the defendant was that the plaintiff should be entitled to any and all excess realized from the sale of defendant's lots over and above the amount claimed by plaintiff as the net prices for which he was to account to defendant."

These instructions are not qualified so as to apply alone to the case made by the petition, but they are drawn so as to apply to the defendant's cause of action stated in the counterclaim, as well as to the cause of action stated in the petition. The pleadings present the issues on this matter of compensation as follows: Plaintiff, in his petition, avers that he was to have all the property sold for over the net plat prices. This averment is denied by the answer. For a further answer and counterclaim it is alleged that the plaintiff <sup>282</sup> agreed to sell the property for a commission of \$1 per front foot; that he sold 3,925 feet, and became entitled to commissions to the amount of \$3,925; that he collected \$9,650, and only accounted for \$4,489, leaving a balance due defendant of \$1,235, and for which he asks judgment. These averments are denied by the reply. The obligation to prove any fact is upon the party who asserts the affirmative of the issue. As to this counterclaim the defendant asserted the affirmative, and the burden was upon him to show that by the agreement the plaintiff was to

sell the property for a commission of \$1 per front foot. Under the issues thus made the plaintiff could show, as he did, that the contract was as alleged by him in his petition, and thereby defeat the counterclaim, but the burden of proof upon the counterclaim did not rest upon him. It rested upon the defendant. The instructions were, therefore, too broad, and were properly refused.

6. The defendant in his counterclaim set up other matters to the following effect: That plaintiff fraudulently and "without the knowledge or consent of the defendant" took some six deeds of trust from as many persons, upon lots which plaintiff had sold, and recorded them prior to the deeds of trust taken to secure the purchase price of the lots. To this the plaintiff replied that the deeds of trust were taken and made prior liens pursuant to the instructions of the defendant, and "with his knowledge and consent," to enable such persons to raise money to build houses on the lots, and thereby facilitate the sale of other lots. Evidence was produced in support of these issues on the one side and the other. The defendant asked the court to instruct the jury that plaintiff had no right to place building loans secured by first mortgages on lots sold by him, without the defendant's consent; "and if he ~~did~~ did so," he could not recover in this case. The court modified the instruction so as to make the quoted words read "and if he did so without the express or implied consent of defendant."

We do not see that there was any error in thus modifying the instruction. Consent being averred, it could be proved by direct evidence, or it could be inferred from the facts and circumstances in evidence. Nor was it necessary to tell the jury what facts proved consent. Whether the defendant consented to placing these prior liens on some of the lots was a fact to be proved like any other fact in the case, either by direct evidence or inferred from facts in evidence. A more elaborate instruction might have been given as to implied consent, but the defendant did not request further instructions on that point, and we cannot say there was error in the instruction as modified and given. The real issues in this case were fairly and well presented to the jury, and the judgment should be affirmed.

BARCLAY, J., absent.

The other judges concur.

that government. To such action on our part the organic law interposes an insuperable barrier. In addition to the provisions of the organic law quoted that instrument also declares that: "The supreme executive power shall be vested in a chief magistrate, who shall be styled 'the governor of the state of Missouri'": Const., art. 5, sec. 4. Section 6 of the same article requires that "the governor shall take care that the laws are . . . faithfully <sup>433</sup> executed." Of the same article, section 1 provides that the governor "shall perform such duties as may be prescribed by law." And section 6 of article 14, as a prerequisite to his entering on the duties of his office, prescribes that he "take and subscribe an oath to support the constitution of the United States and of this state, and to demean himself faithfully in office."

Under these plain and comprehensive provisions it must be apparent that any duty "prescribed by law" for the governor to perform is as much part and parcel of his executive duties as though made so by the most solemn language of the constitution itself.

Conceding the validity of any given law, the fact that the duties which it prescribes are merely ministerial cannot take them out of the domain of executive duties, nor make them any the less those which "properly belong" to the executive department of the government. And should we by our process be able to compel the performance by the governor of such duties, we would, in effect and to all intents and purposes, be performing those duties ourselves; for there can be no substantial distinction drawn between our assumption of duties pertaining to another department of the government and our intervention resulting in the compulsory performance of such duties; *qui facit per alium*, etc.

Nor does the fact that any duty which the law prescribes for the governor to perform might have been assigned to some other officer, who would have been amenable to the process of this court, alter the conclusion to be reached, or vary the result; for the fact would still remain that the act required to be done was nevertheless an official one, assigned by the legislative department of the government to be performed by the executive department, *eo nomine* by the governor and by him alone, and therefore, if he is not bound to obey the law in question as governor, he is not bound to act at all, <sup>434</sup> since he only assumed to obey the laws in his gubernatorial capacity, and not otherwise or elsewhere: See *Rice v. Austin*, 19

said sum of five hundred dollars, in consideration of which sum relator agreed to represent the state as counsel in said cause until the determination thereof. After thus entering into such contract, relator duly performed all of its conditions on his part and discharged his duty as counsel for the state thereunder, until the final determination of said cause, which resulted in Ulrich dismissing his appeal therein on the 15th of May, 1893.

No part of the amount appropriated by the general assembly for the payment of counsel fees and agreed to be paid relator has ever been paid him. On the 22d of August, 1893, relator presented his said contract with and claim against the state of Missouri to Governor William J. Stone, exhibiting to him at the same time all necessary papers, etc., etc., and asked that said sum of five hundred dollars be paid to relator, but which sum said governor neglected and refused to order to be paid to relator. Upon these facts thus presented in the petition relator prays that an alternative writ of *mandamus* issue directed to the governor, <sup>432</sup> commanding him, etc., etc. Waiving the issuance of the alternative writ the governor has entered his appearance herein, and by his counsel has filed a general demurrer to relator's petition, to the effect that the petition does not state facts sufficient, etc.

As the petition states a good contract with and cause of action against the state, and the demurrer admits the allegations of the petition to be true, the only question for determination is, whether the respondent is amenable to the process of this court in a case of this sort; in other words, whether this court has jurisdiction to entertain this application made by relator. The inquiry thus suggested brings into prominence article 3 of our constitution, by which it is provided that: "The powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

In this instance we, constituting a portion of the judicial department of the government, are called upon to exercise, or, what amounts to the same thing, to control the exercise of powers belonging exclusively to the executive department of

that government. To such action on our part the organic law interposes an insuperable barrier. In addition to the provisions of the organic law quoted that instrument also declares that: "The supreme executive power shall be vested in a chief magistrate, who shall be styled 'the governor of the state of Missouri'": Const., art. 5, sec. 4. Section 6 of the same article requires that "the governor shall take care that the laws are . . . faithfully <sup>433</sup> executed." Of the same article, section 1 provides that the governor "shall perform such duties as may be prescribed by law." And section 6 of article 14, as a prerequisite to his entering on the duties of his office, prescribes that he "take and subscribe an oath to support the constitution of the United States and of this state, and to demean himself faithfully in office."

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maintain views diametrically opposed to those here advanced. Most of them will be found collated in the brief filed for relator: *Tennessee etc. R. R. Co. v. Moore*, 36 Ala. 371; *Middleton v. Low*, 30 Cal. 596; *Greenwood etc. Land Co. v. Routt*, 17 Col. 156; 31 Am. St. Rep. 284; *Gray v. State*, 72 Ind. 567; *Magruder v. Swann*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; *Chumasero v. Potts*, 2 Mont. 242; *State v. Blasdel*, 4 Nev. 241; *State v. Governor*, 5 Ohio St. 528; *State v. Nicholls*, 42 La. Ann. 209. In addition to those cited see *Martin v. Ingham*, 38 Kan. 641; *State v. Thayer*, 31 Neb. 82.

The fact that the governor has voluntarily submitted himself to the jurisdiction of this court has been pressed upon our attention as a reason why we <sup>487</sup> should pass on or adjudicate the question submitted; and cases have been cited, among them *Pacific R. R. Co. v. Governor*, 23 Mo. 360, 66 Am. Dec. 673, as showing that where the governor does not claim his exemption, then this court may adjudicate the matters at issue, and leave the governor to claim his exemption afterwards. But we regard such cases as wrong in theory, and unsafe and unsound in practice. If we have authority to render a judgment, then we have jurisdiction to enforce that judgment by all appropriate process, and need not inquire whether any exemption from that process will be pleaded. If, however, we have no jurisdiction over the chief magistrate, his consent will not confer it on us. We will not "assume a jurisdiction if we have it not"; we will not sit as a moot court and pass upon questions and enter a judgment thereon which we are powerless to enforce. "For all jurisdiction implies superiority of power; authority to try would be vain and idle, without any authority to redress; and the sentence of a court would be contemptible unless that court had power to command the execution of it": 1 Cooley's Blackstone, 242.

As we do not possess any jurisdiction over the governor we shall decline any further discussion of this cause, hold the demurrer well taken, and deny the issuance of the peremptory writ.

All concur.

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MANDAMUS TO GOVERNOR.—The writ of *mandamus* will not lie to control the action of the governor of a state, in the exercise of any of his political or governmental powers, whether such powers are conferred upon him by the constitution or by statute: *Greenwood Cemetery etc. Co. v. Routt*, 17 Col. 156; 31 Am. St. Rep. 284, and extended note; also monographic note to *Hawkins v. The Governor*, 33 Am. Dec. 661-668.



**FORD v. UNITY CHURCH SOCIETY.**

[120 MISSOURI, 498.]

**CONVEYANCE—CONSTRUCTION OF.**—A conveyance purporting to convey “one divided fourth part” of certain real property will not be treated as conveying an undivided fourth part of such property if the grantee did not then have any interest beyond an estate for life. The word “divided” cannot be rejected from the description.

**ESTOPPEL—INURING OF TITLE BY.**—If a DEED OF GIFT contains words of conveyance purporting to convey property in fee simple, any title subsequently acquired by the grantor will vest in the grantee as against subsequent purchasers having notice of such deed.

**ESTOPPEL—INURING OF TITLE BY—NOTICE OF.**—If a person has, before acquiring title to real property, made a conveyance thereof in such a form that the title, when acquired, vests in his grantee under the pre-existing deed, nevertheless, the record of such deed does not operate as constructive notice to a person purchasing from the common grantor after his acquisition of the title, and such subsequent purchaser may therefore, unless he had actual notice of the first conveyance, hold the property as against the first grantee to whom the title inured.

**CONVEYANCE—REGISTRY ACTS.**—THE RECORD OF A CONVEYANCE OF REAL PROPERTY MADE BY ONE HAVING NO TITLE THERETO does not, after his acquisition of the title, operate as constructive notice to subsequent purchasers from him. An intending purchaser who searches the records from the time of the acquisition of such title does his whole duty, and cannot be deprived of the benefit of his purchase, though the prior deed made by his grantor before acquiring title was in such form that on the acquisition of the title it vested in the first grantee as against all persons having notice of the conveyance.

*M. A. Reed, and B. R. Vineyard, for the appellant.*

*James A. Plotner, Hall & Pike, and Joseph Merton, for the respondent.*

501 **GANTT, P. J.** This is an action of ejectment for the recovery of the south eight feet of lot 6, all of lot 7, and the north two feet of lot 8, all in block 23, in Smith’s addition to the city of St. Joseph. The answer admits possession and denied each and every other allegation in plaintiff’s petition. The case was 502 tried to a jury, and resulted in a verdict and judgment for the plaintiff.

At the trial plaintiff introduced a patent from the United States to Fred W. Smith, a plat of Smith’s addition to the city of St. Joseph, and a deed from Smith to James Cargill for lots 3, 4, 5, 6, 7, and 8, all in block 23, of said addition, of which the land sued for is a part.

James Cargill, who is the common source of title, died in 1858, leaving a widow, Nancy G. Cargill, sometimes called Agnes G. Cargill, and four children, George W. Cargill, John

C. Cargill, Agnes Owen, and Abby N. Ford. James Cargill left a will, which was duly admitted to probate in the probate court of Buchanan county, by the second clause of which he gave all his estate, real and personal, to his wife for life, or until she should marry again. Mrs. Cargill, who survived her husband, lived until 1877, when she died without having married again. By the third clause of James Cargill's will he gave, at the death of his wife, his home place, describing it, to his son George Cargill, whom he appointed as his executor. By the fourth clause of his will it was provided that at the death of his wife his executor should take charge of all his property, real, personal, and mixed, and, after setting aside said home place to his son George, he should select three disinterested persons to divide all the remainder into four equal parts, and to each of his four children he devised and bequeathed one of these parts thus to be divided.

In 1879, after the death of Mrs. Cargill, the executor selected three persons, who made division of the lands of which James Cargill died seised, into four parts, and assigned one of these parts to each of the children named in the will, or to their assigns. The report of these commissioners is too long to be inserted <sup>502</sup> in this statement. The lots sued for appear in that part which was assigned to John Cargill and his assign, the Real Estate Loan Company, through which defendant's chain of title runs, being named the assignee of this particular portion.

Prior to this division, and prior to the death of his mother, even as early as 1860, John C. Cargill, in conjunction with his wife, Sarah L. Cargill, conveyed by deed of trust his interest in all the real estate which his father owned at his death to Joseph C. Hull, trustee, to secure the payment of certain debts in said deed of trust described. Having made default, the trustee, Hull, in 1865 sold and conveyed, under the power conferred by said deed of trust, all the interest of John Cargill in said real estate to his mother, Agnes or Nancy G. Cargill.

In 1863, by a deed dated September 5th of that year, Mrs. Cargill, in consideration of one dollar and natural love and affection, made a deed containing covenants of warranty, to her daughter, Abby N. Ford, purporting to convey to her "the one divided fourth part" of certain described real estate, including said lots 3, 4, 5, 6, 7, and 8, of which the lots sued for are a part. To the introduction of this deed in evidence

by plaintiff the defendant objected, because it was incompetent and irrelevant, because the deed was void, and ineffectual to pass title to any real estate, and because no real estate was described therein. But the court overruled said objection, and the defendant saved its exceptions. In fact, defendant objected to the introduction of every instrument, except the patent, the plat, and defendant's original answer, read in evidence by plaintiff, on the grounds, among others, that such instruments were irrelevant and incompetent, and saved exceptions to the action of the court in overruling defendant's objections thus made.

<sup>504</sup> After introducing a deed from Mrs. Abby N. Ford to the plaintiff, who is Mrs. Ford's son, and the admission by defendant to the effect that at the death of her father Abby N. Ford was a married woman, and that she continued to be such until February, 1890, when her husband, Erastus D. Ford, died, the plaintiff rested.

Defendant demurred to plaintiff's evidence, which being overruled the defendant duly excepted.

The defendant's title, as shown by the deeds introduced in evidence, runs by two chains into Saxton, whence, becoming united, it runs into defendant. One of these chains of title into Saxton passes from John C. Cargill, by his deed of trust, to Joseph Hull, trustee, conveying his fourth, subject to his mother's life estate in the land, and by the trustee's deed from Joseph Hull, trustee, to Mrs. Cargill, and by the warranty deed from Mrs. Cargill to Sarah L. Cargill, and by the deed of trust from Sarah L. Cargill to James Hull, trustee, and by the trustee's deed from James Hull, trustee, to the Real Estate and Savings Association, and by the warranty deed from the Real Estate and Savings Association to the Real Estate Loan Company to A. M. Saxton. All these deeds were executed upon valuable considerations.

The other chain of title into Saxton passed from Abby N. Ford, by the deed of trust of herself and husband, to Saxton, trustee, and by the trustee's deed from Saxton, trustee, to John D. Richardson, and by the deed from John D. Richardson to Saxton.

By these two chains of title the defendant contends that two-fourths of the land (the John Cargill fourth, and the Abby N. Ford fourth) passed into Saxton, but that if only one-fourth passed into him it is sufficient to uphold defendant's title.

The chain of title from Saxton to defendant passed <sup>see</sup> through the warranty deed from Saxton to Floyd, Ransom, and Steinacker, and through the warranty deed from Floyd, Ransom, and Steinacker to defendant, the consideration expressed in the former deed being three thousand five hundred dollars, and in the latter four thousand five hundred dollars.

At the close of the evidence the court gave three instructions, which peremptorily required the jury to find for plaintiff, to all of which defendant objected and excepted. Defendant asked eight instructions embodying its views of the law, all of which were refused, and it excepted.

1. The plaintiff's case may be stated in a few words: By the will of his grandfather, James Cargill, an estate for life only was given to his grandmother, Agnes G. Cargill, and a remainder of one-fourth to each of his children at her death. That fourth was to be set off by commissioners to be appointed by his executor. After his grandfather's death on September 5, 1863, his grandmother, who had a life estate in all the lands, made a deed with covenants of warranty to his mother, Mrs. Ford, "in consideration of natural love and affection and one dollar," which purports on its face to convey a fee simple absolute to the one divided fourth of the real estate devised by her husband, including the land in controversy. He concedes that at that time no division had been made of James Cargill's lands, and none could have been made under his will prior to the widow's death, and that, if the deed is to be construed as it is written, it is void for uncertainty, but he invokes the rule that where one part of the description is false and impossible, but by rejecting that part a perfect description remains, that part should be rejected and the deed held good and effectual, and he therefore asks that the word "divided" be entirely rejected.

That this court has often in actions at law rejected <sup>see</sup> inconsistent and repugnant clauses in both deeds and wills where their retention was evidently contrary to the intention of the parties, is abundantly attested by its decisions: *West v. Bretelle*, 115 Mo. 653; *Gibson v. Bogy*, 28 Mo. 478; *Rutherford v. Tracy*, 48 Mo. 326; 8 Am. Rep. 104. In so doing, however, it was seeking to carry out the intention of the grantor or testator, by a reasonable construction of the language used. But in *Campbell v. Johnson*, 44 Mo. 247, while this rule was recognized and approved, it was said: "But if the land granted be so inaccurately described as to render its

identity wholly uncertain, then it is admitted the grant is void: *Boardman v. Reed*, 6 Pet. 328. . . . The ambiguity must be patent."

Accordingly, in that case, where the description in the deed was "the southwest quarter of section eleven containing forty acres," the court was asked to reject the words "forty acres"; Judge Wagner said: "This description, by rejecting the quantity of acres, would pass the title to the whole quarter section. That such was not the intention of the maker of the deed is demonstrable, from the fact that one of the other tracts conveyed is the southwest fourth of the same quarter section. . . . To give effect to the deed according to its literal import the plaintiff would have eighty acres more than she contracted for. . . . It is not insisted that the plaintiff bought more than the forty-acre tract sued for in this action. . . . The ambiguity is patent, and cannot be removed by the application of extrinsic evidence."

Now, if the court had been merely governed by a desire to get a legal description, irrespective of the intention of the grantor or the right of the case, nothing would have been simpler than to have rejected the number of acres, and it could have called to its aid the familiar canon that "a call for quantity must give <sup>507</sup> away to metes and bounds," but when it was considered that by rejecting those words the grantor was made to convey four forty-acre tracts instead of one, and his covenants made to convey eighty acres more than he had sold, the court wisely left the parties where it found them, and indicated that the place to reform the deed was in equity, where the rights of both could be preserved: See, also, *Jennings v. Brizeadine*, 44 Mo. 332; *King v. Fink*, 51 Mo. 209.

Now, in this case, what will be the effect of rejecting the word "divided"? If the deed thereby only conveyed what her mother then owned, or only secured to Mrs. Ford, the daughter, the life estate in the one-fourth of which she owned the remainder, and thereby enabled her to anticipate her father's will, and realize on her share in remainder, it would be at once conceded that it ought to be done; but when it appears that this is not the purpose, but that plaintiff proposes if this patent ambiguity is removed to claim that it conveyed to Mrs. Ford not her one-fourth, free of her mother's life estate, but the fourth in fee simple remainder devised to John Cargill, and subsequently bought in by Mrs. Agnes Car-

gill under foreclosure sale of John's fourth, it is perfectly evident that a result that never was contemplated by Mrs. Cargill, or Mrs. Ford either, will be attained.

That Mrs. Cargill never for a moment considered she had accomplished such a result is fully evinced by her own warranty deed to Mrs. John Cargill, her son's wife, made after she had purchased his remainder in fee. Putting ourselves in the place of Mrs. Cargill, and understanding that she only had a life estate in this land, and her daughter, Mrs. Ford, a remainder in a fourth of it, and that Mrs. Cargill had three other children, having the same interest, and that Mrs. Cargill did not acquire the title to John Cargill's fourth ~~see~~ interest in remainder for more than two years after the execution of the deed to Mrs. Ford, is it not clear that she had no intention of giving to Mrs. Ford John's share when she should buy it? To reject any part of her deed to reach such a result would be to ignore her intention.

If Mrs. Ford was not satisfied with this description she should have applied to her mother in her lifetime to correct it, for it is very clear that this deed being a simple gratuity a court of equity would not have enforced it: *Mulock v. Mulock*, 81 N. J. Eq. 602; Fry on Specific Performance of Contracts, 2d ed., 45; *Brownlee v. Fenwick*, 103 Mo. 420; *Anderson v. Scott*, 94 Mo. 637.

But granting that the word "divided" should be rejected from the description, and that the deed is construed to convey one "undivided" fourth, the very opposite of what the grantor declared she was conveying, can the claim of plaintiff be sustained, that the subsequently acquired title of Mrs. Agnes Cargill to the fourth devised to her son John passed to Mrs. Ford by that deed? This claim is based upon the statute as it stood in 1855. "If any person shall convey any real estate, by conveyance, purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid, as if such legal estate had been in the grantor at the time of the conveyance": 1 Rev. Stats. 1855, sec. 3, p. 355.

This section came under review in *Bogy v. Shoab*, 18 Mo. 365. Judge Napton said in that case, in regard to the words "fee simple absolute": "It then depends upon the character

of the deed, whether it is to be affected by our statute. It must be a conveyance purporting to pass the fee simple absolute. . . . The term <sup>509</sup> 'fee simple' is known at the common law as one which defines the quantity of estate. It is used in contradistinction from a fee tail, a life estate, or a term of years. It is evidently not employed in this sense in this provision of the act. It was surely not intended that a quitclaim deed, although the deed uses language to pass the fee, and not any smaller estate, would therefore pass a new title not belonging to the grantor when he makes the deed. It was hardly intended to apply to a deed conveying all right, title, and interest of the grantor. Such a deed will undoubtedly pass the land itself, if the grantor has an estate therein, at the time of the conveyance, but it passes no estate which was not then possessed: *Brown v. Jackson*, 8 Wheat. 452. . . . So, where a party had a vested interest, and also a contingent remainder in lands, and conveyed 'all his right, title, and interest,' the deed was held only to convey his vested interest, although in this case the deed contained a general warranty. . . . *Pelletreau v. Jackson*, 11 Wend. 110": *Valle v. Clemens*, 18 Mo. 486.

In *Brawford v. Wolfe*, 103 Mo. 391, it was held that the doctrine of inurement, whether under the statute or common law, is raised upon the covenants of title contained in the deed under which it operates, and consequently the deed of a married woman only operated to pass all her existing right, title, and interest, citing *Barker v. Circle*, 60 Mo. 259; *Reese v. Smith*, 12 Mo. 348; *State Nat. Bank v. Robidoux*, 57 Mo. 446.

The common-law reason for asserting the title passed by way of estoppel was that it prevented circuitry of action, and hence where no right of action ever existed on the covenants, and they had been released, extinguished, or otherwise closed, some courts held there was no estoppel, and the after-acquired estate would not pass.

<sup>510</sup> To this rule, that where no action existed no estoppel was created, there are, however, a number of well-defined exceptions. Among these Mr. Bigelow, in his work on Estoppel, 5th ed., 445, mentions as a sixth exception to the rule that, "where the consideration of the grant with warranty was love and affection only."

In *Robinson v. Douthitt*, 64 Tex. 101, the father conveyed to his son for love and affection only. The father had previously mortgaged the land. Under the mortgage it was sold and



purchased by a stranger, from whom the father subsequently bought again. The father again sold it to a third person. In a contest between the son and the last purchaser from the father it was held that the father's purchase from the purchaser under his mortgage inured to the son.

Stayton, justice, saying: "We are of the opinion that the estoppel exists in all cases as against a grantor and subsequent purchasers from him with notice of the prior conveyance, when a valid conveyance, having such covenants as are found in the deed before us, is executed": Rawle on Covenants for Title, 5th ed., sec. 257; 3 Washburn on Real Property, 399, 407, and cases cited.

We think the deed in this case must be considered as founded on a consideration of love and affection alone, and that the mere nominal sum of one dollar does not change it into one for bargain and sale: *Hatch v. Straight*, 3 Conn. 34; 3 Am. Dec. 152; *Peck v. Vandenberg*, 30 Cal. 11; *Salmon v. Wilson*, 41 Cal. 595; *Bradley v. Love*, 60 Tex. 472; 1 Devlin on Deeds, sec. 11.

But notwithstanding it was a pure donation, if otherwise valid, a subsequent acquired title obtained by Mrs. Cargill would inure, by virtue of its covenants, to Mrs. Ford and her grantees as against subsequent purchasers of Mrs. Cargill with notice of said deed. Conceding, then, it would carry an after-acquired title <sup>511</sup> as against one having notice, the only notice with which Saxton and his grantees are charged is such as is imparted by our recording acts.

When Mrs. Cargill made the deed September 5, 1863, she had no title to the remainder in the fourth of said lands devised to John Cargill, her son, and construing her deed as not void for uncertainty, it purported to convey a fee simple, but it did not and could not pass John Cargill's fourth until she acquired it in 1865 by the trustee's deed recorded December 4, 1865. On March 4, 1871, by a warranty deed, she conveyed this share of John Cargill so purchased by her to Sarah L. Cargill, his wife, which deed was duly recorded. By mesne conveyance, for value, Saxton became the purchaser of this, John Cargill's, fourth. Mrs. Nancy Cargill died in 1877. Saxton and all the purchasers subsequent to him bought after Mrs. Cargill's death.

The question now is, when they came to search the record of conveyances, were they bound to look for deeds by her to this fourth, antedating her purchase of this land at the trus-

tee's sale in December, 1865? Perhaps no more important question affecting the title of real estate could be raised than the effect of this doctrine of inurement of after-acquired title by estoppel, considered with reference to our recording acts, when rights of innocent purchasers for value are involved. Some courts hold that: "The obligation created by estoppel not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate; it becomes a muniment of title, and all who afterwards acquire the title take it subject to the <sup>512</sup> burden which the existence of the fact imposes on it. These principles had their origin at a very early period in the common law": *Douglass v. Scott*, 5 Ohio, 198; *Knight v. Thayer*, 125 Mass. 25. Now, this language is broad enough, if logically followed, to lead to the result that the after-acquired title vested in the grantee, not only as against the grantor and his heirs, but as against a subsequent purchaser from the latter of the after-acquired title.

Mr. Rawle, who has given the subject a most thorough and rigid analysis, says: This rule, when applied to the case of a *bona fide* purchaser for value without notice, "cannot harmonize with the spirit of the registry acts in force in this country, and leads to the position, which certainly cannot be considered as tenable, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; for, if he have, that person will, according to this doctrine, hold the estate as against this purchaser, and if the property has passed through several hands, a similar search must be made" as to each: *Rawle on Covenants for Title*, 5th ed., sec. 259. He says nothing is more simple than what is termed "the line of title." It is that the first purchaser should search the registry for the deed to his vendor, and trace the title thence back to its source. If he finds no title in him, as would have been the case here, then it is his fault if he takes the deed. Now, as to the second purchaser—one who buys after the vendor acquires a title. He searches till he finds the deed to his vendor, and traces the title back to its source. He

finds it regular, and that since his vendor acquired the title he has not conveyed to any one else. He is not expected to look for conveyances from <sup>§13</sup> his vendor prior to the time the vendor acquired the title. "Yet," as Mr. Rawle says, "according to the practical effect of the doctrine now being considered, and apart from counter equities, the purchaser, having thus brought himself within all the provisions of the registry laws, is not protected at all if his vendor had, before he acquired title, conveyed to another, with covenants, a title which was without existence or value": Rawle on Covenants for Title, 5th ed., sec. 259.

Judge Hare concurs in Mr. Rawle's views, and says in a note to *Duchess of Kingston's case*, 2 Smith's Lead. Cas., 8th ed., 744: "It necessarily tends to give to a vendee who has been careless enough to buy what the vendor has not got to sell, a preference over subsequent purchasers who have expended their money in good faith, and without being guilty of negligence."

In *Crockett v. Maguire*, 10 Mo. 34, Judge Scott said: "The registry of a deed is only evidence of a notice to after purchasers under the same grantor."

In *Dodd v. Williams*, 3 Mo. App. 278, the St. Louis court of appeals held that an examiner of titles was not bound to examine for deeds of any person in the chain of title before the date of his record title.

In *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163, Judge Read said: "It is said that, 'if a man sells and conveys land to which he has no right or title, and afterwards buys or acquires the title to the same land, he cannot claim it as against his grantee'; and, whether this rule is based on estoppel or rebutter, or upon the equity as practiced in Pennsylvania, by which that which ought to be done is considered as done, is perhaps immaterial, as the effects of our recording acts must be the same in either case. . . . 'It is a doctrine, . . . when properly understood and applied, that concludes the truth in order to prevent <sup>§14</sup> fraud and falsehood, and imposes silence on a party only where, in conscience and honesty, he should not be allowed to speak.' Now, in the present case, in searching for encumbrances or conveyances, the search against Calder would begin with his title from Chapman, and the search beyond would be against Chapman and those through whom he claimed, and a search against

Calder during the same period would be considered an utter absurdity."

In *Ely v. Wilcox*, 20 Wis. 528, 91 Am. Dec. 436, it is said: "In Massachusetts it is held that in searching the title it is not necessary to search the record as against an antecedent grantor of the land, further than the registry of a deed duly executed by him, and that, when such a deed has been registered, a purchaser under the grantee will not be affected with notice of a prior deed recorded subsequently, but before the period of his purchase: *Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 418; 8 Am. Dec. 144; *Somes v. Brewer*, 2 Pick. 184; 18 Am. Dec. 406." And the Massachusetts rule is approved by the Wisconsin court: *Odle v. Odle*, 78 Mo. 289; 2 Pomeroy's Equity Jurisprudence, sec. 658.

Our conclusion is, that a recorded deed by one who has no title, but who afterwards acquires the title by recorded deed, is not constructive notice to a subsequent purchaser in good faith from the common grantor. We think when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not "in the line of title," as that term is used by conveyancers and searchers.

When Saxton and those who claimed under him bought, Mrs. Agnes Cargill was dead. The fourth they bought on the face of the deed purported to be John Cargill's fourth. That fourth was conveyed to Sarah Cargill by Mrs. Agnes Cargill. Looking back, <sup>515</sup> then, they would discover that John Cargill's fourth was sold to his mother in December, 1865. The mother was dead. Were they required to look back of the time she acquired John's fourth to see whether she had deeded it to Mrs. Ford in 1863? We think not.

But plaintiffs claim, that, admitting the rule to be as we think it most clearly should be, still Mrs. Sarah Cargill was bound to look back and see whether Mrs. Agnes Cargill had not conveyed her life estate in John's share which she was conveying to her. For several reasons we think this will not avail plaintiff. 1. There are no words in the deed of 1863 to Mrs. Ford that in any manner indicate that Mrs. Agnes Cargill had the slightest intention of conveying the John Cargill share at that time, and as she was conveying only one-fourth out of four, and as she had no title to John's share, there was nothing in that deed which would carry notice as to her life

estate in John's share: *Gatewood v. House*, 65 Mo. 663. But more than that, John Cargill, by his father's will, only took a fourth in remainder. He only mortgaged a fourth in remainder. His mother only bought what he mortgaged, and by her deed she only conveyed what she purchased at that sale, so that her life estate was not involved in the examination, and we must hold that the subsequent purchasers were unaffected by Mrs. Ford's deed, even if it were not void for uncertainty.

The plaintiff and his mother have paid no taxes on this land since obtaining the deed in 1863, have asserted no title, and his claim is wholly without merit. The judgment of the circuit court is reversed.

All concur.

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**DEEDS—AFTER-ACQUIRED TITLE.**—Where a person conveys land in which he had no interest at the time, but afterwards acquires title thereto, he will not be permitted to claim in opposition to his deed from the grantee or any person claiming under him: *Brown v. McCormick*, 6 Watts, 60; 31 Am. Dec. 450, and note. Land acquired by a grantor subsequent to his conveyance of the same to different grantees inures to the benefit of the first grantee: *Morrison v. Caldwell*, 5 T. B. Mon. 426; 17 Am. Dec. 84; *Wilson v. Troup*, 2 Cow. 195; 14 Am. Dec. 458; *Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449, and note; *Kirkaldie v. Larrabee*, 31 Cal. 455; 89 Am. Dec. 205, and note. See, also, the extended notes to *Trull v. Eastman*, 37 Am. Dec. 129; *Bank v. Mercereau*, 49 Am. Dec. 231, and *Frink v. Darst*, 58 Am. Dec. 583. The decision in the principal case is well calculated to thwart or annul the statute therein referred to, providing that if a person conveying property by a deed purporting to be of the fee has not the title, but acquires it subsequently, such after-acquired title shall pass by such prior conveyance. The decision is based upon two assumptions: 1. That to permit the prior grantee to hold the "title, as against a subsequent one, is to reward one" who has been careless enough to buy what the vendor has not got to sell; and 2. That a searcher of records may properly content himself with examining the records for conveyances and encumbrances only from the time of the making of a conveyance to the party whose title he is examining. If, however, the person taking the first conveyance has had inserted therein covenants of seisin or of warranty, or such words as the statute of the state require to vest in him any title which his grantor may subsequently acquire, he has not been negligent. Moreover, if his grantor does afterwards acquire the title, it at once, by operation of law, passes by the prior conveyance, and vests in the prior grantee. If, afterwards, the grantor makes a second sale and conveyance he makes them when he again has no title; and if the first purchaser was careless in taking his conveyance before the grantor had any title the second purchaser is equally careless in making a purchase after the only title which the common grantor ever held has passed to the first purchaser by the operation given by law to the first deed.

If it be true, as it has always been, that a title when acquired may, without any conveyance made after its acquisition, pass, by way of estoppel,

under a prior conveyance, then searchers of records have no right to ignore this principle of law; but, in recognition of it, must search for conveyances containing covenants for title as against each person in whom at any time the title has vested, irrespective of the date of such conveyances. If this be not true, the effect of such conveyances and covenants may always be avoided by a sale of the property to a person having no knowledge thereof, and persons without such knowledge may always be found if, as in the principal case, they are rewarded for their ignorance. In nearly all of the states a judgment lien is held to attach to lands acquired after the docketing of the judgment: Freeman on Judgments, sec. 307; and, if this is true, there must be a necessity for searching for judgment liens against the owner of real property before, as well as after, he acquired his title. We do not understand that the effect of the registration laws is restricted to the mere indexing of conveyances and encumbrances, and that an intending purchaser does his whole duty by examining the indices as to any claimant from and after his acquisition of the title. He is charged by law with notice of the contents of all instruments properly of record, and which, in fact, affect the title.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

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**LIVERPOOL AND LONDON AND GLOBE INSURANCE  
COMPANY v. BUCKSTAFF.**

[28 NEBRASKA, 146.]

**INSURANCE—CONDITION AGAINST ALLOWING PREMISES TO BECOME VACANT.**

If a tenant of the insured occupies the insured premises until one day before they are destroyed by fire, when he partially moves out, leaving a part of his furniture in the building, the premises are not vacant and unoccupied within the meaning of a policy which becomes void if the insured property becomes vacant and unoccupied during the term of the insurance, without notice to and the written consent of the insurer.

**APPELLATE PRACTICE—JUDGMENTS—ADMISSION OF INCOMPETENT EVIDENCE.**

A judgment rendered by the court in a case tried without a jury cannot be reversed for the admission of incompetent evidence.

*Harwood, Ames & Kelly*, for the plaintiff in error.

*C. O. Whedon*, for the defendant in error.

147 NORVAL, J. This is an action upon a fire insurance policy issued by the plaintiff in error upon the same building covered by the policy sued on in the case of *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, decided herewith. The stipulations in the policies are substantially alike, and the issues presented by the pleadings in the two cases are the same. By agreement of parties this cause was submitted to the trial court on the evidence taken in that suit. There was judgment for plaintiff in the sum of sixteen hundred and ninety-four dollars and eighty-two cents.

What is said in the opinion in the case above referred to bearing upon the charge of the court does not apply to the case before us, nor will a cause tried to the court be reversed



for the admission of incompetent testimony: *Enycart v. Davis*, 17 Neb. 228; *Willard v. Foster*, 24 Neb. 213.

It is claimed that the building was vacant and unoccupied without the consent of the company. The proof shows that when the policy was written, and from thence until about the time of the loss, the building was occupied and used as a hotel by one William Splain, a tenant of the plaintiff. The hotel was closed to the public on October 20th, and the tenant moved out on that day, or the following, and the building thereby became unoccupied, except a portion of the furniture and other personal property remained therein at the time of the fire, which occurred on the night of October 21st. As to just what amount of property was in the building when it burned, the evidence is conflicting. That introduced by the plaintiff tends to prove that a considerable portion yet remained, while there is other evidence <sup>148</sup> which goes to show that all the personal effects belonging to the tenant were removed, except a table, some broken bedsteads, a few dishes, and a lot of broken crockery. There was also evidence to the effect that the tenant had paid up his rent to November 1st, while there is to be found other testimony contradicting this, and tending to show that Mr. Splain was in default in the payment of rent, and that a few days before the loss he was notified by the plaintiff to quit the premises. The plaintiff had not taken possession of the building, nor had he received the keys therefor from the tenant. Of course it was competent for the trial court to pass upon the conflicting evidence and determine what should be believed and what rejected. The finding being in favor of the plaintiff, we must regard as established every fact which the testimony in his favor tends to prove.

Is the company relieved from liability for the loss by reason of the condition in the policy declaring the policy void, if the insured premises, during the term of the insurance, should become vacant or unoccupied without notice to and consent of the company in writing?

In *Springfield Fire etc. Ins. Co. v. McLimans*, 28 Neb. 846, it was held that a temporary vacancy of a building will not defeat a recovery upon a policy. And there can be no doubt, both upon reason and authority, that such is the rule. Some of the authorities hold that the vacancy of a building during the time necessary for the changing of tenants of the assured will be fatal under the ordinary terms and conditions in a

fire insurance policy. But we are unwilling to go that far. It seems to the writer that such a temporary vacancy was a contingency contemplated by the parties, and against which the provision was not intended to apply. Many recent authorities so hold.

In *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269, 20 Am. St. Rep. 69, Lyon, J., in construing the term "vacant or unoccupied" in an insurance policy, observes: "Under certain circumstances, premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so within the meaning of that term in insurance policies. Thus, if one insures his dwelling-house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insures it as a tenement-house or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant, and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it. This distinction is made in some of the cases—in *Lockwood v. Middlesex Mutual Assur. Co.*, 47 Conn. 561; *Whitney v. Black River Ins. Co.*, 9 Hun, 39; 1 Wood on Insurance, sec. 91, pp. 208-210, and cases cited."

The following sustain the above doctrine: *Traders' Ins. Co. v. Race*, 142 Ill. 338; *Home Ins. Co. v. Wood*, 47 Kan. 521; *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47; 28 Am. St. Rep. 263; *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 84 Am. St. Rep. 595; *American Central Ins. Co. v. Clarey*, 28 Ill. App. 195; *City Planing etc. Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654; 16 Am. St. Rep. 552.

We are satisfied that the trial court was justified in finding that the premises were not "vacant and unoccupied" within the meaning of that term in the policy. The judgment is affirmed.

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**INSURANCE—VACANCY OF PREMISES—CHANGE OF TENANTS.**—A temporary vacation of insured premises for four days occurring upon a change of tenants, and to suit the convenience of the departing tenant, is not such a

cessation of occupancy as will vitiate a policy, providing that it shall be void if the building insured shall "become vacant or unoccupied or not in use," and provided, also, that the loss occurred during such vacancy: *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; 34 Am. St. Rep. 595, and note, with the cases collected. Under a policy of insurance on leased premises, which contains a condition against leaving the premises vacant or unoccupied, a reasonable time must be allowed to carry out a change of tenants or occupancy: *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47; 23 Am. St. Rep. 263, and note; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; 23 Am. Rep. 111, and note.

**APPEAL—IMMATERIAL ERROR.**—Error cannot be predicated upon the admission of immaterial testimony in a case tried by the court without a jury, when the evidence otherwise justifies the findings and judgment: *Dewey v. Allgire*, 37 Neb. 6; 40 Am. St. Rep. 468. The reception of incompetent evidence is not a sufficient ground for reversing the judgment when the action was tried before the court without a jury: *Frieb v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198.

## FIREMAN'S FUND INSURANCE CO. v. BUCKSTAFF.

[38 NEBRASKA, 150.]

**INSURANCE—LIMITATION OF TIME TO COMMENCE ACTION.**—Under a policy of insurance providing that no action shall be maintained thereon unless brought within six months after the loss, which shall not become payable until sixty days after proofs thereof are received by the company, the limitation commences to run only from the time the loss is due and payable, and suit may be brought within six months from the expiration of the sixty days.

*Harwood, Ames & Kelly*, for the plaintiff in error.

*C. O. Whedon*, for the defendant in error.

<sup>151</sup> NORVAL, J. This record presents one question not raised nor considered in the cases of the *German-American Ins. Co. v. Buckstaff*, 38 Neb. 185, and *Liverpool etc. Ins. Co. v. Buckstaff*, 38 Neb. 146, *ante*, p. 724, and that is, whether the action is barred by the terms of the policy. One of the stipulations in the policy is as follows:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery . . . . unless such suit or action shall be commenced within six months after the occurrence of the fire by reason of which the claim for loss or damage is made; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, lapse of time shall be taken and deemed as conclu-

sive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

The policy also provides that the loss is not payable until sixty days after the proofs of loss have been received by the company at its office in Chicago, Illinois. It appears that such proofs were furnished November 3, 1887; that the fire occurred on the twenty-first day of October of the same year, and this action was begun on the fourth day of May, 1888.

When did the period of limitation commence to run? The identical question was before the court in *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459. It was there held that the limitation commenced to run from the time the loss is due and payable. Following that case, and the numerous authorities cited in the opinion, we must hold that the plaintiff's cause of action did not accrue until the expiration of sixty days after the proofs of loss were received by the company, and, the action having been instituted within six <sup>152</sup> months after the expiration of this sixty days, the suit was not barred.

This case was decided in the district court upon the evidence adduced on the trial of the German American Insurance Company against this defendant in error, and upon which the decision was based in the Liverpool & London & Globe Insurance Company case. For the reasons stated in the opinion filed herewith in the latter case the same judgment will be entered in this.

Judgment affirmed. —

**INSURANCE—LIMITATION OF ACTION ON POLICY.**—Where a policy of fire insurance contains a stipulation that no action upon the policy shall be sustained unless commenced within six months after the time the fire shall have occurred, the period of limitation begins to run from the date of the fire, although the policy also provides that no loss shall become due and payable until proof of loss is made and examined by the company: *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870, and extended note; *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877. The doctrine of the principal case that the limitation commences to run only from the time that the loss is due and payable is sustained by *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459.

**BELKNAP v. STEWART.**

[33 NEBRASKA, 204.]

**EVIDENCE.—DECREE OF DIVORCE** is not evidence in another suit except in a case in which the same parties, or their privies, are litigating in regard to the same subject of controversy.

**EVIDENCE.—DECREE OF DIVORCE.**—In an action by a third person against a husband to recover for necessities furnished his wife while living apart from him a judgment granting the wife a decree of divorce on the ground of her husband's cruelty is not admissible to show that she was justified in living apart from him, and therefore carried his credit with her.

**HUSBAND AND WIFE—SEPARATION—LIABILITY OF HUSBAND FOR NECESSARIES FURNISHED WIFE.**—Without a special promise of the husband to pay for the board and lodging of his wife, living apart from him, he is not liable therefor unless she is living separate from him by his consent, or his conduct is such as to justify her in thus living apart from him.

*Pound & Burr*, for the plaintiff in error.

*Sawyer & Snell*, for the defendant in error.

306 RAGAN, C. Belknap sued Stewart in the district court of Lancaster county, alleging in his petition "that on the seventeenth day of September, 1889, Anna R. Stewart, wife of the defendant, commenced boarding and lodging at plaintiff's house, and continued to board and lodge with plaintiff until the thirty-first day of December, 1889; that said defendant caused the said Anna R. Stewart, his wife, to leave the home of the defendant, and that she was obliged to leave said defendant's home on or about said seventeenth day of September; that the defendant agreed to pay for said board and lodging what the same was reasonably worth, and that said board and lodging were reasonably worth the sum of four dollars and fifty cents per week. No part of the same had been paid, and there was due the plaintiff from the defendant the sum of \$——." Stewart's answer to this petition, so far as we notice it, was: 1. A general denial of all the allegations of the petition; 2. That at all the times mentioned in plaintiff's petition he was the owner of, and in possession of, a comfortable home in the city of Lincoln, which he had provided with suitable provisions and board, all of which were free to the said Anna R. Stewart, and that, if she procured board of the plaintiff, she did it without the consent of the defendant, and wholly upon her own responsibility. Stewart had a verdict and judgment, and Belknap brings the case here.

From the record before us it appears that on the 22d of September, 1889, Stewart's wife left his home and began boarding and lodging with Belknap, and so continued until December 31, 1889. Two days after Stewart's wife left him she began a suit against him for divorce on the grounds of extreme cruelty, and some time afterwards obtained a decree of divorce on those grounds. On the trial of this case the pleadings, findings, decree, and all the other proceedings in the divorce case were without objection <sup>207</sup> read in evidence to the jury by Belknap's counsel. When the court came to charge the jury he excluded from their consideration all these pleadings and proceedings in the divorce suit. This action of the court is one of the errors assigned here by Belknap. The court was entirely right in so excluding them from the jury's consideration. They should not have been admitted in the first place. The object of using these divorce proceedings and decree as evidence in this case was to establish conclusively the fact that Mrs. Stewart, by reason of her husband's extreme cruelty towards her, had just cause for leaving his home, and that she therefore carried her husband's credit with her. But were the divorce proceedings and decree competent evidence in the case at bar for such purpose? We think not.

*Burlen v. Shannon*, 8 Gray, 388, was a suit by a third party against the husband for necessities furnished the wife. The court said: "The decree of divorce was not competent evidence, because it was not between the same parties. In that case it was the wife against the husband; in the present, it is a person who has furnished the wife with necessities, and he sues the husband. It has been argued that a direct adjudication of a court having a peculiar jurisdiction on the subject of marriage and divorce, like a decree in a process *in rem*, is conclusive and binding upon all persons having to establish or contest the conclusions of fact determined by it. We have no doubt that this court has a peculiar jurisdiction on the subject of marriage and divorce, and that a decree upon a libel for divorce directly determining the *status* of the parties, that is, whether two persons are or are not husband and wife, or, if they have been husband and wife, that such a decree divorcing them, a *vinculo* or a *mensa*, would be conclusive of the fact, in all courts and everywhere, that they are so divorced. If it were alleged that a marriage were absolutely void as being within the degrees of consanguinity, a

decree of this court, on a libel by <sup>see</sup> one of the parties against the other, adjudging the marriage to be void or valid, would be conclusive everywhere. . . . The legal social relation and condition of the parties, as being husband and wife or otherwise, divorced or otherwise, is what we understand by the term '*status*.' To this extent the decree in question had its full effect by which every party is bound. . . . Beyond this legal effect in a judgment in a case of divorce—that of determining the *status* of the parties—the law applies as in other judicial proceedings, that a judgment is not evidence in another suit, except in a case in which the same parties or their privies are litigating in regard to the same subject of controversy.

“But it is contended that there was a privity between the party suing for necessities furnished the wife and the wife herself, so as to make the judgment in a former suit by the wife against the husband evidence in plaintiff's suit against him. But the case is not within any of the definitions of privity, either in law or in fact, known and recognized by the rules of the law. In regard to the rights sued for in this action, this plaintiff does not claim the same right or interest which the wife could claim as privy in contract or in blood, or in estate. The relation of the wife was much more nearly that of an agent having an authority to bind the defendant by a contract. . . . No judgment in a suit between such agent and the defendant can be evidence. One test to decide whether a judgment is admissible as between privies is to inquire whether it would be mutual. Both of the litigants must be alike concluded, or the proceedings cannot be set up as conclusive upon either.

“This rule, that a judgment must be between the same parties or their privies is to be construed strictly to mean parties claiming under the same title. The present plaintiff could not in any form have appeared in the suit for divorce or taken any part in the trial, or put any question to <sup>see</sup> a witness, or appealed from the judgment. . . . A judgment or judicial determination is conclusive even between the parties as evidence only of what is directly put in issue and tried, not of the collateral and incidental facts which are involved in the discussion, but not embraced in the decree.

“The decree in question does not directly bear upon the fact whether the wife was justified in absenting herself from her husband's house, or whether in fact she did absent her-



self. . . . She may have suffered extreme cruelty, and yet not absented herself from her husband's house; and so, *vice versa*, she may have been placed in such a condition of suffering or danger as would render it justifiable to leave her husband's house without having suffered extreme cruelty."

This case is directly in point here, and we approve both of the reasoning and the conclusion thereof. It follows that the court did not err in taking the divorce proceedings from the consideration of the jury.

Another error alleged here by Belknap is the refusal of the court to give to the jury the following instruction: "The jury are instructed that if they find from the evidence that said defendant, Asa Stewart, and his wife, Anna Stewart, had due and regular trial in the action for a divorce in this court before the Honorable Allen W. Field, and that in that action the said court made findings of fact as follows: 'Finds that the plaintiff and defendant were duly married at the city of Keokuk, state of Iowa, on the seventh day of November, 1865, as set forth in said petition, and that ever since said marriage plaintiff has conducted herself towards the defendant as a faithful, chaste, and obedient wife; finds that the defendant has been guilty of extreme cruelty towards the plaintiff as in her petition alleged, and all without just cause or provocation,' then you are instructed that said defendant, Asa Stewart, is bound and concluded by such findings of the court in said action for a divorce." <sup>210</sup> What has already been said disposes of this assignment. Had the court permitted the divorce proceedings to remain before the jury it would have been error to give this instruction.

Another error alleged is: "On the trial of this case the rules of evidence seem to have been entirely disregarded, as leading questions were allowed to be asked Stewart as a witness." The record discloses that Stewart was afflicted with paralysis, and, in order to elicit any thing from him, it seems to have been necessary to so frame questions that he could answer in monosyllables. The court did not err in permitting leading questions to be propounded to this witness. There were two issues in this case: 1. Did Mrs. Stewart have such cause for leaving her husband's home as to render him liable for her support by Belknap? 2. Did Belknap furnish Mrs. Stewart board and lodging on her own credit or on the credit of her husband? There is evidence in the record to support the finding of the jury in Stewart's favor on both these

issues. The correct rule undoubtedly in such cases as the one at bar is, in the absence of any special promise of the husband to pay for the board and lodging of his wife living apart from him, he will not be responsible therefor, unless she was living separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board: *Schnuckle v. Bierman*, 89 Ill. 454. There is no evidence in the record that Stewart ever promised to pay his wife's board and lodging, nor is there any evidence that she lived apart from him by his consent.

There is no error in the record, and the judgment of the district court is affirmed.

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**EVIDENCE.—JUDGMENTS, WHEN ADMISSIBLE AGAINST PERSONS NOT PARTIES NOR PRIVIES TO:** See *Missouri Pac. Ry. Co. v. Heidenheimer*, 52 Tex. 195; 27 Am. St. Rep. 861; *Bridger v. Ashville etc. R. R. Co.*, 27 S. C. 456; 13 Am. St. Rep. 653; *Fahey v. Crotty*, 63 Mich. 383; 6 Am. St. Rep. 305; and note; and *Pico v. Webster*, 14 Cal. 202; 73 Am. Dec. 647, and note.

**HUSBAND AND WIFE—SEPARATION—HUSBAND'S LIABILITY FOR NECESSARIES.**—A husband is liable for necessities supplied to a wife constrained to live apart from him by his mistreatment of her: *Mitchell v. Treanor*, 11 Ga. 324; 56 Am. Dec. 421, and note; *Billing v. Pilcher*, 7 B. Mon. 458; 46 Am. Dec. 523, and note; *Walker v. Simpson*, 7 Watts & S. 83; 42 Am. Dec. 216, and note. If a wife has adequate means of support she cannot procure necessities on the credit of her husband, though she is living separate from him for a justifiable cause: *Hunt v. Hayes*, 64 Vt. 89; 33 Am. St. Rep. 917, and note. A wife deserted without cause by her husband may bind him by a contract for her necessities: *Oinson v. Heritage*, 45 Ind. 73; 15 Am. Rep. 258; *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606, and note. The implied authority of a wife, known to live separate from her husband, to bind him for necessities furnished her depends wholly upon his legal obligation to provide for her: *Gill v. Read*, 5 R. L. 343; 73 Am. Dec. 73, and note. See, also, *Cunningham v. Irwin*, 7 Serg. & R. 247; 10 Am. Dec. 458, and extended note.

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## **HOLMES v. FIRST NATIONAL BANK.**

[33 NEBRASKA, 826.]

**NEGOTIABLE INSTRUMENTS—INDORSEMENT OF—PAROL EVIDENCE TO VARY.—**

Parol proof of a contemporaneous parol agreement is admissible to explain or qualify a blank indorsement of a promissory note in an action between the parties thereto.

**NEGOTIABLE INSTRUMENTS—INDORSEMENT IN BLANK—PAROL EVIDENCE TO VARY.**—A blank indorsement of a negotiable instrument before due, transferred to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence.

**NEGOTIABLE INSTRUMENTS—BLANK INDORSEMENTS—PAROL EVIDENCE TO VARY.**—As between the parties to a negotiable instrument, a blank in-

document may be modified by parol evidence, and the entire transaction may be thus shown, although resting partly in writing and partly in parol. This does not affect a third party who is a holder without notice before due, and for a valuable consideration.

*Webster, Ross & Fisher* for the plaintiff in error.

*A. G. Greenlee, and Marquett, Dewees & Hall*, for the defendant in error.

**328** MAXWELL, C. J. On the twenty-second day of January, 1890, J. G. Hutchins and C. H. Hutchins made and delivered to the plaintiff Holmes a promissory note for the sum of three thousand four hundred dollars, due in ninety days from date, with ten per cent interest. Afterwards, but at what time does not clearly appear, Holmes indorsed said note in blank and waived demand and notice, and delivered the note to the defendant, and this action is upon the indorsement. Holmes in his answer alleges:

1. That the note was given by the makers for building material furnished by him for the erection of certain buildings in the city of Lincoln, on which he had taken a mechanic's lien, which had been assigned to sureties on the note.

2. That the sureties would not consent to a renewal of the note unless he would proceed to foreclose his lien; that thereupon John R. Clark, the president of the bank, proposed to take the note in question and an assignment of the lien, and permit the makers of the note to pay from two hundred dollars to four hundred dollars per month thereon, and that the bank would carry said indebtedness and exhaust the property to which the lien attached before bringing an action against Holmes, and he was required to refrain from prosecuting an action **329** on the lien; that Holmes did refrain from prosecuting said lien and accepted the note in question, and indorsed the same to the bank, it being expressly agreed between Holmes and the bank that it should first exhaust its said security before resorting to an action on the indorsement.

3. "That before plaintiff herein brought this action and refusing to foreclose said lien, though then holder thereof, this defendant, for his own protection and for use of said bank, instituted an action thereon in the name of himself and of said plaintiff in this court against said Hutchins, and Hutchins and others, and therein expressly alleged that said plaintiff was entitled to receive all the proceeds of said lien to be applied on said note, and said plaintiff in said action fully

affirmed and ratified the same, and claimed the benefit of said lien under the assignment thereof; and in the trial of said action said plaintiff, by its cashier, produced in this court the said note, and its cashier was sworn, and testified on behalf of the said plaintiff and this defendant, and plaintiff in said action recovered a judgment of foreclosure of said mechanic's lien against each of said pieces of real estate and improvements; but said judgment has in part been appealed from, and is in consequence thereof not yet realized or collected; but said judgment is yet unreversed, and is in full force and effect, and said action was pending when this suit was commenced, and then undetermined."

The reply is a general denial.

On the trial of the cause the court directed the jury to return a verdict for the bank, which was done.

The proof tends to show the following facts: The note sued on was a renewal of a former note. The indorsers of the original note were J. H. McClay and J. R. Webster. A mechanic's lien was filed and assigned to Webster and McClay as indemnity against their indorsement. When the note became due foreclosure was commenced by Holmes. Then Hutchins proposed to Holmes to borrow at the bank \$200 for Holmes. Clark, the president of the bank, sent for Holmes and said, in substance, that he was willing to let Hutchins have the money if Holmes would assign the lien to the bank, and he would release McClay and Webster as sureties. Holmes' counsel advised him not to risk any further delay in collecting from Hutchins; but, through the importuning of Hutchins and Clark, the suit was stopped and Holmes made a transfer of his mechanic's lien to the bank, and delivered the security to Mr. Clark. Hutchins had agreed to pay from two hundred dollars to four hundred dollars a month until the note was paid, and Clark agreed to take this mechanic's lien as security for the note until such time as it was paid. Clark thought Hutchins would pay the note, and it would get Hutchins out of his embarrassment until he could dispose of his property. There was this agreement, that, in indorsing that note, Clark took the lien as security, and if there should ever be any trouble there would be nothing done until that lien was exhausted. After the note became due the bank, when about to institute foreclosure suit, discovered a discrepancy in the description of one piece of the property, and Mr. Callahan, the cashier, directed Holmes to begin foreclosure, which was

case. The petition in the foreclosure suit, founded on the lien and note sued on here, was given in evidence; so also were the original mechanic's lien and assignments thereof, and the decree in the foreclosure suit. The suit on the lien was commenced September 19, 1890, more than a month prior to the bringing of this action. The principal question in this case is the right to permit proof of a contemporaneous parol agreement to explain or qualify a blank indorsement of a promissory note in an action between the parties.

In *Lye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604, the supreme court of Ohio, in an able opinion, discusses the question. It is said: "There are authorities which hold that the contract which the law implies or presumes in such cases is as conclusive and certain as if written out in full, and that parol evidence <sup>281</sup> is not admissible to vary or contradict it. The reason given for requiring such strictness, in substance, is that the indorsement adds to the value of the instrument by giving it currency in commercial transactions; and that its value would be impaired, and circulation restricted, by admitting oral testimony to vary or contradict the terms of the contract which the law presumes or implies from the indorsement, even as between indorser and indorsee: See *Bank of United States v. Dunn*, 6 Pet. 51; *Dale v. Gear*, 38 Conn. 15; 9 Am. Rep. 353; *Barnard v. Gaslin*, 23 Minn. 192; *Bartlett v. Lee*, 33 Ga. 491. While we sanction the doctrine that upholds the credit and negotiability of commercial paper in the hands of any *bona fide* holder for value, we do not, in order to accomplish this, see the necessity of carrying the doctrine quite so far as it is carried in the cases above cited. As between the indorser and indorsee, we regard the blank indorsement as only *prima facie* evidence of the contract which the law presumes to arise therefrom. If the indorsement is made upon no other, that contract will control the rights of the parties. If there was a contemporaneous contract between the parties upon which the indorsement was made, both reason and justice require that, as between themselves, the actual, and not the presumed contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not be necessary, or even probably impair the currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorsees without notice be impaired or limited in any degree. As to all the world except

the parties to the special contract, and as between themselves only, the character of the instrument as commercial paper will remain unaffected": To the same effect, *Hudson v. Wolcott*, 39 Ohio St. 618.

In *Bailey v. Stoneman*, 41 Ohio St. 148, the court held: "The indorsement being in blank, parol evidence of what <sup>was</sup> was said by the parties in and about the transfer was properly admitted: *Dye v. Scott*, 35 Ohio St. 194; 35 Am. Rep. 604, followed.

"2. The indorsement *prima facie* implied that the indorser assumed its usual obligations, and upon him rested the burden of proving a different understanding and agreement.

"3. If the evidence justified a finding that the then understanding or agreement was that the indorser assumed the usual obligation, the fulfillment by E. T. B. of his contract to build applied as a consideration to support the transfer of the note as made."

In *Preston v. Gould*, 64 Iowa, 44, this rule was approved, and undoubtedly is the law of the modern cases. A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But as between the original parties, a blank indorsement may be modified by parol. At most it is only *prima facie* evidence of the contract which the law implies therefrom. Between the parties the entire transaction may be shown, although a part of it is in writing, and a part rests in parol; that is, what was the actual contract between the parties? And oral testimony is admissible to prove the actual agreement. This does not affect the paper as to third persons who have no notice of this agreement, where the paper is transferred before due for a valuable consideration: Wharton on Evidence, sec. 1059; *Kidson v. Dilworth*, 5 Price, 564; *Castrique v. Buttigieg*, 10 Moore P. C. C. 94; *Susquehanna Bridge etc. Co. v. Evans*, 4 Wash. C. C. 480; *Smith v. Morrill*, 54 Me. 48; *Brewer v. Woodward*, 54 Vt. 581; 41 Am. Rep. 857; *Hamburger v. Miller*, 48 Md. 317; *Bruce v. Wright*, 3 Hun, 548; *Ross v. Espy*, 66 Pa. St. 481; 5 Am. Rep. 394; *Hudson v. Wolcott*, 39 Ohio St. 618; *Bailey v. Stoneman*, 41 Ohio St. 148; *Rothschild v. Griz*, 31 Mich. 150; 18 Am. Rep. 171; *Greusel v. Hubbard*, 51 Mich. 95; 47 Am. Rep. 549; *Hueske v. Broussard*, 55 Tex. 201; *Preston v. Gould*, 64 Iowa, 44.

In the case at bar the court should have submitted the ~~tan~~

timony to the jury, and it erred in directing a verdict. The judgment is therefore reversed, and the cause remanded for further proceedings.

Reversed and remanded.

**NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE TO VARY INDORSEMENTS IN BLANK.**—The payee of a negotiable instrument indorsing it in blank is liable as an indorser only, and cannot be made liable as a guarantor by parol: *Fell v. McDonald*, 8 Greenl. 213; 23 Am. Dec. 499, and note. In an action by the indorsee against the indorser in blank of a promissory note parol evidence is not admissible, in the absence of fraud or mistake, to show a contemporaneous agreement between the parties that the indorsement was without recourse: *Charles v. Denis*, 43 Wis. 56; 24 Am. Rep. 383. By the law of New York a parol contract cannot be introduced in evidence to change the legal import of a blank indorsement: *Downer v. Chesborough*, 31 Conn. 39; 4 Am. Rep. 29. Where the owner of a note not a party to it indorses it in blank to another parol evidence is competent in an action between them to show an agreement that he was not to be liable in a certain event: *Brewer v. Woodward*, 54 Vt. 581; 41 Am. Rep. 857, and note. Parol evidence is admissible to show that an indorser in blank signed with the express understanding that he was not to be liable as a joint promisor, but collaterally only: *Barrows v. Lane*, 5 Vt. 161; 26 Am. Dec. 293. Parol evidence is admissible to vary the *prima facie* effect of an indorsement in blank, by showing an oral agreement made by the parties at the time of the indorsement: *Perkins v. Catlin*, 11 Conn. 213; 29 Am. Dec. 282, and note. See, also, the notes to *Kulenkamp v. Groff*, 15 Am. St. Rep. 288; *Dreum v. Bunn*, 7 Am. St. Rep. 367, and the extended notes to *Stuck v. Beach*, 39 Am. Rep. 116; *Prentiss v. Danielson*, 13 Am. Dec. 56, and *Hill v. Ely*, 7 Am. Dec. 281.

## UNION STOCKYARDS COMPANY v. CONOYER.

[38 NEBRASKA, 433.]

**NEGLECT—DEFECTIVE APPLIANCES—PLEADING.**—In an action by a servant against his master to recover for personal injuries received through the negligence of the latter in furnishing defective appliances it is unnecessary for the servant to plead and prove want of knowledge of such defect. Such knowledge is matter of defense which, to admit proof, must be pleaded.

**PRACTICE—MOTION TO DIRECT VERDICT.**—A motion by defendant to direct a verdict in his favor can only be sustained by the court when there is a failure to prove some material fact in the case, by reason of which no liability of the defendant to plaintiff is shown. For the purpose of such motion every point which the evidence tends to prove in favor of plaintiff must be considered as established.

*Breckenridge, Breckenridge & Crofoot*, for the plaintiff in error.

*Mahoney, Minahan & Smyth*, for the defendant in error.



**489** MAXWELL, C. J. This is an action brought by the defendant in error against the plaintiff in error to recover for the death of **490** W. J. McAnnely, caused, it is alleged, by the negligence of the plaintiff in error. On the trial of the cause the jury returned a verdict for five thousand dollars in favor of the defendant in error, and made special findings as follows: "The jury are directed to make the special findings in answer to the following interrogatives:

"1. What was the condition of the track at the point where the forward trucks of the next to the last car in the train left the rails? A. Covered by coal and cinders and other rubbish.

"2. Did the defendant know the condition of the track as it was on the morning of the accident? A. Not known.

"3. Did Mr. McAnnely have knowledge, or means of knowledge, of the condition of things at the place where the accident occurred? A. Not known.

"4. What caused the forward trucks of the car next to the last one to jump the rails? A. Cinders and coal.

"5. Was or was not the death of Mr. McAnnely accidental? A. It was not accidental.

"6. How did Mr. McAnnely come to be thrown under the cars? A. It was caused by the jar received from the trucks leaving the rails.

"7. What caused the death of Mr. McAnnely? A. He was crushed beneath the cars."

A motion for a new trial was overruled and judgment entered on the verdict.

1. The principal ground of the action is that the death was caused by the defective condition of the track, and it is objected by plaintiff in error that there is no allegation in the petition that the deceased "did not know, or had any means of knowledge, of the defective condition of the **491** track complained of." These facts are a matter of defense and need not be alleged or proved in the first instance. This question was before the supreme court of Iowa in *Mayes v. Chicago etc. Ry. Co.*, 63 Iowa, 562, and *Wells v. Burlington etc. Ry. Co.*, 56 Iowa, 520, and it was held to be a matter of defense, and unless pleaded by the defendant, proof could not be given on that point. There are many other cases sustaining the decisions of the Iowa court, but it is unnecessary to burden this opinion with them. Substantially the same rule was adopted by this court in *City of Lincoln v. Walker*, 18 Neb. 244, and other cases since decided. The first objection is untenable.

2. A number of objections are made to the introduction of evidence. It is unnecessary to review these at length. No material error has been pointed out, and no material error in that regard was committed by the court.

3. At the close of the testimony of the plaintiff below defendant below asked the court to instruct the jury to return a verdict in its favor. This the court refused to do, to which the defendant below excepted, and now assigns the ruling of the court for error. The record shows that there was testimony tending to sustain every proposition in the petition. Where this is the case, and a motion is made to direct a verdict, the rule is that every point which the evidence tends to prove for the purposes of the motion must be considered as established. Such a motion can only be sustained where there is a failure to prove some material fact in the case by reason of which no liability of the defendant to the plaintiff is shown. The motion, therefore, was properly overruled.

4. Errors are assigned in giving various instructions, and also in refusing to give several instructions asked by the defendant below. It is unnecessary to review these at length. The instructions given seem to be applicable to the testimony, and those asked were properly refused. <sup>492</sup> There is no material error in the record, and the judgment is affirmed.

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MASTER AND SERVANT—DEFECTIVE APPLIANCES—PLEADING.—A servant suing to recover for personal injury need neither allege nor prove his ignorance or lack of means of knowing that the agency which he was called upon to use was dangerous and unsafe, as it is the duty of the master to know this: *Donahue v. Enterprise R. R. Co.*, 32 S. C. 299; 17 Am. St. Rep. 854; *Majee v. North Pac. etc. R. R. Co.*, 78 Cal. 420; 12 Am. St. Rep. 69. The contrary rule is maintained in *Bussell v. Laconia Mfg. Co.*, 48 Me. 113; 77 Am. Dec. 212; and *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 251.

NEGLIGENCE—DIRECTING VERDICT.—If a party alleging negligence fails to establish by proof all of the elements necessary to constitute it the court may instruct the jury to return a verdict for the defendant: *Faris v. Hobbs*, 134 Ind. 269; 39 Am. St. Rep. 261, and note with the cases collected.

## KILPATRICK v. KANSAS CITY AND BEATRICE RAILROAD COMPANY.

[28 NEBRASKA, 620.]

**MECHANICS' LIENS—MORTGAGE—PRIORITIES.**—An investment company which furnishes the money for the construction of a railroad, taking the notes of the persons proposing to build it, guaranteed by an existing railroad company controlled by them, and to be secured by a mortgage to be executed by the proposed railroad company when incorporated, is to be regarded as a promoter and builder of the road, and is not entitled to have the mortgage declared a lien upon the franchises and property of the road constructed, superior to mechanics' liens arising out of its construction, when at the date of the execution and delivery of the mortgage the proposed railroad company has acquired no right of way or franchises, and has taken no steps toward their acquisition further than filing its articles of incorporation and naming its officers and directors, and the money has been paid over to the individual contracting parties then officers of the corporation, to be expended by them in the construction of the road, and the contracts for labor and material have been made by them in the name of the company.

**MECHANICS' LIENS—WAIVER BY TAKING COLLATERAL SECURITY.**—Waiver of a mechanic's lien is not inferred from the taking of collateral security from another, in a manner not inconsistent with the continued existence of the lien.

**JUDGMENTS.—INTERLOCUTORY ORDERS OR FINDINGS** in a pending suit in equity in a federal court is not such final determination of the rights of the parties as to bar litigation of the same matters in a state court.

**ACTIONS—ABATEMENT.**—The mere pendency in a federal court of an action between the same parties, and concerning the same subject matter, cannot be successfully pleaded in bar or abatement of an action in a state court.

**EVIDENCE—JUDICIAL NOTICE.**—State courts do not take judicial notice of former adjudications in federal courts upon the subject matter in controversy.

*Hornblower, Byrne & Taylor, Warner, Dean & Hagerman and Griggs & Rinaker, for the appellant.*

*Harwood, Ames & Kelly, and I. P. Dana, and R. S. Bibb for the appellees.*

*Marquett, Dewees & Hall, for the intervenors.*

631 RAGAN, C. This is an appeal from a decree of the district court of Gage county, rendered July 17, 1891. The action was brought by the appellees, Kilpatrick Bros. & Collins, to foreclose a mechanic's lien against the property of the Kansas City & Beatrice Railroad Company (hereinafter called the "Beatrice company") for a balance due for labor and material furnished in the grading of that company's railroad. 632 The appellant, the New York Security & Trust

Company (hereinafter called the "trust company"), was made a party defendant, as it held a mortgage on the road of the Beatrice company, given by it to secure an issue of \$400,000 of its negotiable bonds. The appellee, the Kansas City, Fort Scott & Memphis Railroad Company (hereinafter called the "Fort Scott company"), was also made a party and filed its answer, claiming a lien for a balance due it for ties sold and delivered to the Beatrice company, and used in the construction of its road. The appellee, the Kansas City, Wyandotte, & Northwestern Railroad Company (hereinafter called the "Wyandotte company"), was made a party defendant, as it was in the possession as lessee of the road of the Beatrice company. By the decree of the district court Kilpatrick Bros. & Collins were given a lien upon the property in question for the sum of \$29,445.17; and the Fort Scott company was given a lien for the sum of \$33,864.79. The two were declared first liens of equal rank, and to prorate one with the other. The trust company, by the decree, was also given a lien on the property, subject to the first two liens, for the sum of \$278,267.85. The decree also provided, that, in case of default in the payment of these amounts within a time fixed the property and franchises of the Beatrice company should be sold, and the proceeds of the sale applied to the satisfaction of the liens in the order of their priority. The trust company brings the case here, and avers that the decree is erroneous, in the fact that its lien is postponed to those of the Kilpatrick Bros. & Collins and the Fort Scott company.

It is conceded that the value of the property in controversy is insufficient to pay the amount of all the liens adjudged against it. The facts disclosed by the record before us, so far as they are deemed material, are these: That some time prior to the twenty-ninth day of May, 1889, the Wyandotte company, a foreign corporation, had constructed a line of 622 railroad from Kansas City, Missouri, to the line between the state of Kansas and the state of Nebraska, at a point called Summerfield. For the prosecution of this undertaking money had been furnished by the Philadelphia Investment Company (hereinafter called the "investment company"), a Pennsylvania corporation, having its place of business in the city of Philadelphia, in said state, upon terms and security which are not disclosed by the record, and which are immaterial except as showing that the investment company was familiar with the affairs of the Wyandotte company,

which shortly thereafter proved to be insolvent, and was, at the date of the negotiations hereinafter mentioned, financially unable to carry out an enterprise involving an outlay of considerable sums of money. Previous to this time, however, and during the progress of the construction of the road of the Wyandotte company, and probably as a part of that undertaking, it was proposed to extend this line of road to Beatrice, Nebraska. At the time this project was first undertaken it was supposed and intended that this extension would be made in the name and under the authority of the Wyandotte company. Subsequently, however, pursuant to correspondence between one Erb, the president of the Wyandotte company, and one Brockie, the president of the investment company, the plan was so changed as to require the formation of a Nebraska corporation, and accordingly a certificate of incorporation of the Beatrice company was executed and recorded on the nineteenth day of June, 1889. On the first day of July, 1889, a mortgage was executed by the Beatrice company upon all its property and franchises then existing, or thereafter to be acquired, purporting to be given to secure its negotiable bonds to the amount of \$400,000. This mortgage, which was filed for record on the thirteenth day of July, 1889, contained, among other things, the following:

“WHEREAS, the said party of the first part is the owner of a line of railroad constructed, and in process of construction, <sup>624</sup> from a point on the line of the Kansas City, Wyandotte & Northwestern Railroad where the same intersects the state line between Kansas and Nebraska, thence extending in a northerly direction through Pawnee county, state of Nebraska, to the city of Beatrice, in Gage county, in said state, all of said line of railroad being of the estimated length in the aggregate of thirty-five miles, or thereabouts; . . . .

“WHEREAS, for the purpose of building, furnishing, equipping, and operating said railroad, the party of the first part is desirous of borrowing money, and has resolved to execute bonds of said company in amounts of \$500 each, as hereinafter stated: . . . . Upon the execution and delivery of this mortgage, and from time to time thereunder, the trustee shall, as requested by resolution of the board of directors of the railroad company, certify the bonds hereunder to the extent of, and not exceeding \$400,000, and on said resolutions of said board of directors shall sell all bonds requested to be certified, and their proceeds shall actually be used for and applied,

under the direction of said board, to the construction, completion, maintenance, and operation of said railroad, and not otherwise."

On the seventeenth day of July, 1889, all these bonds were delivered to the investment company under an agreement as finally perfected, that the latter company should advance, from time to time, to the Wyandotte company, or to Erb, as its president, money for the construction of the proposed Beatrice company, upon the notes of the Beatrice company, guaranteed by the Wyandotte company, for the payments of which these bonds should be held as collateral security. The entire amount of the capital stock of the Beatrice company was subscribed by and issued to the Wyandotte company; but it is evident that nothing was ever paid or intended to be paid therefor. During the earlier weeks of these negotiations, and until about the time of the execution of the bonds and mortgage, it had <sup>625</sup> not been decided whether a Nebraska corporation should be formed or not; nor, if so, what should be its name; nor had the right of way been secured, or the route, or the Nebraska terminus of the road determined upon.

Elias Summerfield, the treasurer and general manager of the Wyandotte Company, testified on the trial as follows:

Q. Was there a note for this money? A. Yes, sir.

Q. Who executed it? A. It was first executed by the Kansas City & Northwestern road. Afterwards the attorney of the trust company suggested that it had better be changed, and returned the note to us to be executed by the Kansas City & Beatrice road, and indorsed by the Kansas City, Wyandotte & Northwestern road, and by the Northwestern Construction Company.

Q. When was that exchange made? A. I can't tell you now. It was after the first note was signed, and we had gotten some of the money on it.

Q. Was it as late as October? A. I can't remember. I possibly might find out at my office.

Q. But the original notes were made by the Kansas City, Wyandotte & Northwestern Railroad Company, and indorsed by the construction company? A. Yes, sir. We had n't even incorporated the Kansas City & Beatrice road.

Q. It had n't been incorporated? A. No, sir; I think not, when the arrangement was made for the loan.

Q. The money was borrowed by the Kansas City, Wyandotte & Northwestern road and placed in its treasury? A.

The exchange of notes was made before we got all the money. We might have got one payment, or the second, I can't tell which.

<sup>626</sup> Q. Did you have a treasurer for the Kansas City & Beatrice road? A. Yes, sir; a nominal one.

Q. But none of this money went into his hands? A. No, sir.

Q. And these bonds of the Kansas City & Beatrice road were placed as collateral, after issued, to these notes? A. Yes, sir.

Q. Do you know when the bonds were issued, as a matter of fact? A. I think it was some time after we got the first issue—the first \$65,000.

Q. After that? A. Yes, sir.

Q. How long after? A. I think some time after the latter part of July, 1889; I am not sure.

Q. At the time these first notes were executed, what, if any thing, had been done by the Kansas City & Beatrice road towards the organization for the building of such road? A. Nothing at all.

Q. Had the grade stakes been set? A. No, sir; we had not even concluded on the final location at that time, nor even the name of the road.

Q. And the right of way had not been procured? A. No, sir.

Q. So that nothing, in fact, had been done at the time you executed these first notes and got the first money? A. I think not. Of course, we had made preliminary surveys.

Q. But had not established your lines? A. We had not done any thing until the eighth day of August, 1889; the date of the vote for municipal bonds was had at Beatrice. If we had n't gotten the bonds we would not have built. We intended going to Wymore.

Q. Are you able to state approximately the amount of actual cash you received from the Philadelphia Investment <sup>627</sup> Company or from the Wyandotte & Northwestern company? A. I think something about \$250,000. There was about three per cent commission paid for the loan.

Q. Money was constantly taken out for interest on these notes from month to month? A. No, sir; they were not due. The road went into the hands of a receiver before the notes became due, I think; that is my impression. We might have made one payment of interest, I am not sure—I expect we



did; I think we paid the interest on the six months' installment; I have forgotten about that.

It was estimated that the proposed construction would cost \$850,000. Of this sum \$260,000 was to be furnished by the investment company upon the notes of the Wyandotte company, afterwards changed to the notes of the Beatrice company, guaranteed by the Wyandotte company, and collaterally secured by the bonds of the Beatrice company, to the amount of \$400,000, secured by a mortgage on its anticipated property. These bonds, when executed, were to be placed in the possession of the investment company. Sixty-five thousand dollars of the cost of the proposed road was expected to be realized from municipal donations, and any deficiency was to be made up from the treasury of the Wyandotte company. The success of the enterprise depended upon the co-operation of the investment company, and its officers and attorneys were consulted at every step in the organization and progress of the enterprise. Pursuant to this arrangement money was furnished from time to time by the investment company to Erb and his associates, which it was intended by the investment company should be used in the building of the road. However, the investment company does not know how much thereof was in fact so employed, nor how much, if any, was diverted to other purposes. Erb and his associates proceeded to make contracts, as officers of, and in the name of, <sup>§28</sup> the Beatrice company, for work and material for the construction of the road of that corporation, and among others entered into a contract with Kilpatrick Bros. & Collins for grading and with the Fort Scott company for ties. The parties thus contracted with fulfilled their respective obligations, performing the labor and furnishing the material contemplated, until the eighth day of January, 1890, when the same was completed. For the balance remaining unpaid on both their accounts notice of liens against the property of the Beatrice company was duly filed. It is not denied that all of the bonds, together with the notes for which they were deposited as collateral, remain in the possession of the investment company.

The important and controlling question in this case is whether the liens of the men who furnished the material and labor that entered into the construction of this railroad are superior to the lien of this mortgage made thereon before the road had any existence, except on paper, and made for the

benefit of the investment company, which knew, at the time of its execution, that the property which it purported to cover had in fact no existence. The statute relative to mechanics', materialmen's, and contractors' liens upon property of this character is found in chapter 54, article 2 of the Compiled Statutes, 1893, sections 2 and 3 of which are as follows:

"Sec. 2. And when material shall have been furnished, or labor performed, in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor and materialman, contractor, or subcontractor shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, roadbed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection, or improvement provided for and mentioned in this act.

639 "Sec. 3. Every person, whether contractor or subcontractor, or laborer or materialman, who wishes to avail himself of the provisions of the foregoing section, shall file with the clerk of the county in which the building, erection, excavation, or other similar improvement to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien and verified by affidavit; such verified statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date on which the last of the material shall have been furnished, or the last of the labor is performed; but a failure or omission to file the same within the periods last aforesaid shall not defeat the lien, except against purchasers or encumbrances in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed."

It is urged that this statute is not unlike other enactments of the same general character, in that it entitles the contractor, laborer, or materialman to a lien only upon the interest of the party or parties at whose instance the work may be done or material furnished; and that, therefore, if at the time the work of the construction or reparation is begun

the property is subject to existing liens shown on the public records, such liens will be entitled to precedence over any claim that may be asserted for labor or material furnished for improvements on the property after the date of the filing of said liens; and it is argued, therefore, that the appellant is entitled to a first lien upon the property in question for the amount of the advances made by the investment company to Erb and his associates, because the mortgage of the Beatrice company was executed and filed for record at a date prior to that at which the <sup>630</sup> contracts for labor and material were entered into. To sustain this contention the learned counsel for the appellant cite many authorities. Of the authorities so cited, the one most relied upon, perhaps, is *Toledo etc. R. R. Co. v. Hamilton*, 134 U. S. 296, in which it is said: "A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, either directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction." It appears from the reported opinion in this case that January 17, 1880, the railroad company executed a mortgage on this property to the Central Trust Company of New York to secure the payment of \$1,250,000 of six per cent bonds. The mortgage was to cover all the property then owned, or that might thereafter be acquired, by the railroad company. The trust company accepted the trust created by the mortgage, and the railroad company issued its bonds. They were certified by the trust company and sold on the market. On March 20, 1883, Hamilton entered into a contract with the company, under and by which he furnished material, and erected for the company a dock on the Maumee river, and, having received only a partial payment, he filed a claim for a mechanic's lien for the balance due him. The land on which the dock was built was a part of the railroad, and covered by the mortgage made to the Central Trust Company. Brewer, justice, speaking for the supreme court of the United States, said: "It will be noticed, and it is a fact which lies at the foundation of this case, that the contracts for the construction of the dock were not made till more than three years after the execution and record of the mortgage. The record imparted notice to Hamilton and to all others of the fact and terms of the mortgage; and the question is thus presented whether a

railroad company, mortgagor, can, three years after creating by a recorded <sup>631</sup> mortgage an express lien upon its property, by contract with a third party, displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate no one would have the hardihood to contend that it could be done, and there is in this respect no difference between ordinary real estate and railroad property. A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien whose priority cannot be displaced thereafter directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction."

By the judgment of the court pronounced in that case Hamilton's lien was held to be subject to the lien of the mortgage executed by the railroad company in January, 1880. But in that case the railroad company had a real franchise. It owned, and had owned for some time, the lands upon which the docks were built. The mortgage had been of record on a railroad in existence for some years prior to the performance of this work by Hamilton.

In our opinion the principles of law announced by the supreme court of the United States in that case are inapplicable to the facts disclosed by the record in the case we have under consideration. When the mortgage of the Beatrice company was executed that company had, at most, but a nominal existence, and nothing whatever upon which a mortgage or other conveyance could operate. Property or property rights it did not have; but it is said that it had a franchise, and that this could be mortgaged, and that the mortgaging of it, together with the after-acquired property, drew with it the subsequently constructed road and appurtenances. How can it be said with any degree of accuracy that the Beatrice company, at the time of the execution of this mortgage, was possessed of a franchise? At that time nothing had been done, or certainly determined upon, in its <sup>632</sup> behalf, excepting the mere execution and filing of its certificate of incorporation. No map of its proposed line of road had been filed or prepared. No right of way had been procured, nor steps been taken towards its acquisition; nor had the proposed route or Nebraska terminus of the road been determined upon, further than if the road should be built at all, which

was a matter still in abeyance, and dependent upon certain contingencies, it would extend through and into certain counties. It is quite certain, at least, prior to the location of the line of the proposed road and the procurement of its right of way, either actually or by the beginning of proceedings therefor, under the statutory enactments for such purposes, any other five persons might have filed a like certificate of incorporation, and, if possessed of the inclination and necessary pecuniary ability, might have constructed, maintained, and operated the very line of road now in controversy.

A franchise which not only imposes upon its possessor no obligation, but confers upon him no right or privilege not enjoyed by every other person, is so singular as to defy classification. Mankind are prone to mistake words for things, and are often pardonable for the fault; but it is difficult to form a sufficient excuse when there is nothing in existence for which the word is in any sense descriptive. Be that as it may, it is evident from facts disclosed in this record that the Beatrice company never had or was intended to have, either by the investment company or by Erb and his associates, any beneficial interest in or control over its franchise or property, at least not until after the building and equipment of the line. The controlling motive and intent of the parties, and the sole purpose from the inception of the scheme, was not that the Beatrice company should build the road, borrowing such sums as in addition to its own means should be necessary, but that the investment company should construct the road through the instrumentality of the Wyandotte company and Erb <sup>623</sup> and his associates, as its agents, retain at all times, by means of the bonds and mortgage, the practical possession and control of its franchise, property, and revenues. Doubtless it was hoped by the Beatrice stockholders and incorporators that something would be realized in the way of dividends or otherwise, over and above what would be required for the satisfaction of the principal and interest of the advances made by the investment company; and this sum, whether great or small, would accrue to them upon the sale of the Beatrice road, or otherwise, as a compensation for their participation in the undertaking. But they embarked nothing in the venture, and cannot, with any propriety, be said to have had any interest in its success, except the contingent and speculative one just mentioned. Practically, the investment company undertook to construct the railroad

of the Beatrice company, furnishing the requisite means therefor, and employing Erb and his associates, as its agents, to effect a technical organization, procure such municipal donations as were obtainable, look after and make the requisite contracts for the procurement of the material and construction of the road, see to the disbursement of the money, they assuming no personal obligation or responsibility in the matter, and accepting as compensation for their service such profits, if any, as should be realized out of the speculation. To regard such a transaction in the same light as that of the erection of a building by a mortgagor upon mortgaged lands for which he retains the title is, it seems to us, false reasoning.

It is urged with much force by counsel for the appellant, that the record of the mortgage was constructive notice to persons dealing with the railroad of the rights of the mortgagee. True, but that is the extent of its effect. The recording of the mortgage created no rights or obligations. Under the circumstances of this case the facts that the bonds which the mortgage purported to secure were negotiable is of no significance. The rights of the parties and <sup>634</sup> the legal effect of the transaction would be precisely the same had no such bonds been executed or contemplated, and had the mortgage recited at length the transactions and agreements between the investment company and Erb and his associates, and simply pledged the proposed road and franchise to the investment company as security for its advances for the construction of the road. Had the mortgage contained such a recital no one would doubt, it seems to us, that the investment company was the real promoter and builder of this road, and that Erb and his associates, and the officers of the Beatrice company were in reality, though not nominally, the investment company's agents, and that the contracts and obligations incurred by them, even in their own names, in and about the construction of this road, would be binding upon the investment company.

It is admitted by counsel for the appellant that, if the bonds had remained in the hands of Erb or the Wyandotte company into whose possession they first came, the mortgage would not have been entitled to priority over the mechanic's lien claimants, and we are unable to see that any thing subsequently occurred which improves the *status* of these bonds. What recourse or remedy, if any, the lienholders would have had if the bonds had been sold to innocent purchasers, or

whether prior to the completion of the road and filing of the liens there could have been any such purchasers we are not called upon to determine.

Another case relied upon by counsel for the appellant is *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649. The syllabus of that case is as follows: "In this case unsecured floating debts, due by a railroad company for construction, were, in the absence of a statutory provision, held not to be a lien on the railroad superior to the lien of a valid mortgage on it, duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value." It will be seen from an examination of the opinion in that case <sup>635</sup> that it differs from the one at bar in many important particulars. There the railroad company, at the time of the execution of the mortgage, owned not only its franchises, but the roadbed and right of way and township aid voted for the construction of the road; and the bonds which the mortgage was intended to secure were delivered by the railroad company to one Crawford in consideration of his agreement to construct the road, and he, and not the company, negotiated and pledged the bonds for money with which to perform his contract; and the lien claimants contracted, not with the railroad company, but with Crawford, with actual knowledge of the existence of the mortgage and of the consideration upon which the bonds were delivered to Crawford, and of the fact that they were negotiated by him, and that the proceeds belonged to him and were being expended in the fulfillment of his contract. Of course the fact that the parties to whom he sold the bonds took precautions to have the proceeds actually expended in the construction could not have the effect, equitably or otherwise, to postpone the lien of the mortgagee to that of the other persons, who, with full knowledge of all the circumstances, were selling Crawford material for use under his contract for the railroad company, for the procurement of which, on his part, he had been paid by the very securities which they sought to have deferred for their benefit.

A case very much like the one at bar is the *Farmers' Loan & Trust Co. v. Canada etc. Ry. Co.*, 127 Ind. 250, where it is said: "The remaining question may be thus stated: Is the lien of the appellant's mortgage superior to the liens of the appellees? In order to intelligently discuss this question it is necessary to state the material facts out of which it arises. Those facts may be thus summarized: On the twenty-eighth



day of May, 1888, the railway company entered into a contract with the Burns Construction Company to build and equip its road. Burns <sup>626</sup> was the president of the railway company and also the general manager of the construction company. On the 28th of August, 1888, the railway company ordered the execution of a trust deed, and the instrument was written and signed in duplicate. One of the duplicates was delivered by Burns to the Farmers' Loan & Trust Company on the eighteenth day of October, 1888. The other was retained by the railway company. The bonds which the trust deed was executed to secure were retained by the company that executed the mortgage; but from time to time bonds were delivered to Burns upon estimates issued to him by the railway company's engineer. Ten of the bonds were transferred to William Dallin, and sixty-six were transferred to John Fitzgerald, a subcontractor. The remainder of the bonds, three hundred and sixty-four in number, were hypothecated by the Burns Construction Company, but when, where, to whom, or for how much, is not shown. In considering the question of priority, one of the important things to be kept in mind is that the mortgage was executed upon property that had in fact no existence, for the railroad mortgaged had not been built. That there is a material difference between a case such as this, where the railroad had not been built, and a case where the railroad has been constructed, is so evident that no one can fail to perceive it the instant his attention is directed to the matter. As held in *Brooks v. Railway Co.*, 101 U. S. 443, parties must in such a case as this be deemed to have contracted with reference to the existing condition of things so far as they were open to observation. The mortgagee must have known that its security was valueless as long as there was no road in existence, and it must have known, also, that labor, material, and money would be required to build the road. It was bound to know, too, what the law was, for 'it entered into and became a part of their contract.' This general rule has been repeatedly declared and enforced by this court. The principle we are discussing was applied <sup>627</sup> to the case of a lien asserted by a miner, and it was held that the lien was superior to a mortgage. But the present case is much stronger than the one referred to, for here there was in fact no property in existence when the mortgage was made. The property upon which the mortgage finally fastened was created by the labor, materials, and the

money of the appellees. We are strongly inclined to doubt whether the mortgage lien would be paramount even if the bonds which the mortgage was executed to secure had been delivered before any notices of liens were filed. Very strongly reasoned decisions declare that the liens of the mechanics are superior to the lien of the mortgage in cases where the mortgage is executed before the construction of the railroad: *Neilson v. Iowa Eastern Ry. Co.*, 44 Iowa, 71; *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 615. We need not, however, decide this question, but it is proper to say that as the labor, materials, and money of the appellees gave all there is of value to the property claimed under the mortgage, the mortgagee ought to show a clear and strong superior right in order to defeat the claims of those who in reality brought the property into existence. The doubt in our minds is whether the mortgagee's lien can, in any event, be justly held to be the prior one. We have no doubt that if the mortgagee can succeed at all, it must be because it is shown clearly and strongly that the mortgagee is a *bona fide* purchaser. In our judgment the appellant has shown no such right as entitles it to the paramount lien. It is true that the trust deed or mortgage was placed in the hands of the mortgagee or trustee before some of the notices were filed, but the instrument securing the bond was a mere shadow; for had no bonds ever been delivered to *bona fide* holders, the instrument would never have been effective against these lienholders. We are far within the authorities in asserting this, as they carry the doctrine much further. . . .

"The delivery of the mortgage or trust deed alone did not destroy the priority of the liens of the appellees, for the delivery of such an instrument cannot of itself defeat equitable or legal claims, since it is essential that one who asserts a right against a legal or equitable claim should show that he parted with value before notice of such equitable or legal right: *Anderson v. Hubble*, 93 Ind. 570; 47 Am. Rep. 394, and cases cited; *Hunsinger v. Hofer*, 110 Ind. 390. This is the rule in ordinary cases, and certainly it must govern a case like this, where the mortgagee seeks to defeat the claims of those whose labor, materials, and money created the property which it is sought to subject to the lien of the mortgage. The mortgagee must succeed, if at all, as a *bona fide* holder of bonds executed under the mortgage. It cannot, as against the claims of the laborers, mechanics, and materialmen, be

deemed a *bona fide* holder unless it affirmatively shows that it paid value for the bonds before notice of the liens. The rule in analogous cases is well settled in this state, and the strong equities of the appellees call for its liberal application in this instance. . . . There is reason for saying that it was the duty of the party buying the bonds to ascertain whether a lien had been placed on the property prior to the time of its acquisition of those instruments, but we do not go as far as that in this case. . . . We are not here seeking a general rule that shall apply to every case resembling the present, nor do we attempt to lay down any such rule. We simply adjudge that in such a case as this the mortgagee cannot prevail over laborers and materialmen without showing that it is a *bona fide* holder of the principal debt in all that the term '*bona fide* holder' implies. It cannot, in a case like this, where there was no railroad in existence when the mortgage was delivered, be deemed a *bona fide* holder as against laborers, mechanics, and materialmen without showing that before notice of the acquisition of the liens under the statute a fair value was paid for the bonds."

629 We concur in both the reasoning and the conclusion of the foregoing opinion. It is not to be denied that the supreme court of the United States distinguishes between the rolling stock and chattels of a railroad company, which it characterizes as "loose property susceptible of separate ownership and separate liens," and the roadbed, station-houses, tracks, etc., and upon this distinction holds that, while the doctrine as to the after-acquired property applies to the former, it does not apply to the latter. The basis of this distinction is the doctrine relative to fixtures to real property. It is not denied that if one owns real estate which is subject to a valid mortgage or other lien, and another sells him personal property which he permits to be affixed to or incorporated into the real estate, he, by so doing, waives any right he might otherwise have to claim a lien for the purchase price superior to the prior mortgage; and this arises out of the necessity of the case, because, otherwise, the mortgagee might be deprived of his security by the depreciation of values, or by extravagant or exorbitant improvements without his knowledge or consent. But how can this be the case when a mortgage is made and the money advanced upon it for the sole purpose of bringing into existence the entire property upon which the mortgage is intended to rest? The case at bar is a good illustration. The

investment company knew that its bonds and mortgage were, and would remain, of no value unless the railroad should be constructed; it knew that in order that such a road should be constructed that material and labor were indispensable, and that the Nebraska statute guarantees a lien to those who should furnish them. The investment company made Erb and the Wyandotte company its agents for the purposes of this construction, and it owed the duty to persons furnishing material and labor in the building of this railroad to see that the money advanced was applied to the payment of their claims.

Another point made by the appellant is that Kilpatrick Bros. & Collins, by their conduct, have waived their rights to a lien. It appears that, after the completion of the work, one Strohm, who was their accountant and book-keeper, together with Erb, the president of both railroad companies, made a computation and agreement as to the amount remaining unpaid under the contract, and received from the latter accepted drafts upon the Wyandotte company for that amount; but he testified, without contradiction, that it was expressly agreed that these drafts were not taken or to be considered as payment, but only as collateral security therefor, and as constituting a record of the computation and accord; and that there was no agreement for the relinquishment of any existing or prior obligation in favor of his principals, and that no such release was intended by him, nor, so far as he was aware, by Erb. We do not think that the mere receipt of the drafts under such circumstances amounted to a waiver, which, in the absence of an express agreement, will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his own conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended, or consented to; and it is not claimed that such was the case here.

In *Farlow v. Ellis*, 15 Gray, 229, it is said: "Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage which, but for such waiver, he [the party relinquishing] would have enjoyed. It may be proved by express declaration, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still, voluntary choice not to claim is of the essence of waiver, and not mere negligence."

In Jones on Liens, section 1011, it is said: "The mere taking <sup>641</sup> of security for the amount of a debt for which a lien is claimed does not ordinarily destroy the lien. To have this effect there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and destructive of it."

"SEC. 1013. The taking of a mortgage upon the same property upon which the creditor claims a statutory lien may not displace the lien. The mortgage is regarded as a cumulative security, and the creditor may enforce either the lien or the mortgage. So, also, the taking of the collateral obligation of another person for the payment of the lien debt does not ordinarily debar the lienholder from claiming the security of his lien, unless the circumstances are such that an intention to waive the lien may be reasonably inferred": *Payne v. Wilson*, 74 N. Y. 848.

The appellant pleaded, by way of cross-petition to the claim of the Fort Scott company, that the latter had intervened in an action still pending in the United States circuit court for this district concerning the same matter, and that that court, by an interlocutory decree, had adjudged the lien of the intervenor to be superior to that of appellant. An interlocutory order or finding in a pending suit in equity in a federal court is not a final determination of the rights of the parties, but one which may be modified or discharged at any time before the enrollment of the final decree: *Ayres v. Carver*, 17 How. 592; *Thomas v. Wooldridge*, 23 Wall. 283; *Forgay v. Conrad*, 6 How. 201; *Ex parte Jordan*, 94 U. S. 248. This order, therefore, did not merge the claim of the Fort Scott company, and was not a bar to the litigation of the same matters in the state court. The mere pendency in the courts of another jurisdiction of an action between the same parties, and concerning the same subject matter, cannot be successfully pleaded in bar or abatement: *Gordon v. Gilfoil*, 99 U. S. 168; *Sharon v. Hill*, 22 Fed. Rep. 28; *Stanton v. Embrey*, 93 U. S. 548, and authorities there <sup>642</sup> cited. A demurrer to this answer was therefore properly sustained.

The foregoing conclusions we regard as decisive of the case and as rendering unnecessary the determination of other questions, some of them important and far-reaching, which are discussed in the briefs. The judgment of the district court is, therefore, in all things, affirmed.

Part J., inserted, and occurred in an opinion submitted by Commissioners Irvine and Ryan, in which the conclusion is reached that, as between the mortgage lien and the construction or mechanics' liens in suit, the latter have no priority and do not displace the former. In such opinion it is observed in a general way that the state statutes permit railway companies to mortgage their property and franchises for the purpose of securing money borrowed by them for the construction and equipment of their roads, and it is also provided that such mortgages may include, not only the property owned by the companies making them at the time of their date, but property, both real and personal, thereafter acquired by them. The state statute also provides for liens upon railroads to secure laborers and materialmen for labor performed and material furnished for the construction, repair, or equipment of railroads. This statute, though passed at a different time, as a distinct act, is so far analogous to the general mechanics' lien law as to induce the necessary conclusion that the construction placed on the latter must apply to the former, namely, that the lien attaches from the time labor is begun or the first material furnished, but as between two or more lienors upon the same improvement there is no priority unless the intervening rights of third persons require a different rule. "A railroad is an entity. Its whole line, including right of way, roadbed, stations, shops, equipment, and all property necessary for the effective operation of the road, in its entirety, constitutes a single property, which cannot, in the absence of statute or of peculiar equities of a very controlling character, be dismembered by selling different portions separately. The mortgage here in question, and the liens, must be treated as coextensive in regard to the property upon which they operate, unless a separation of this property is practicable, and required by the equities of the case." Applying the ordinary rule, the construction liens in the present case would not attach until more than a month after the time that the mortgage had become a lien upon the property. "It is claimed, however, that under the facts of this case the mortgage should be subordinated to the construction liens. The principal ground upon which this contention is based is that a mortgage upon after-acquired property attaches to such property only to the extent of the mortgagor's interest therein, and subject to any liens existing thereon at the time of its acquisition by the mortgagor." This principle is subject to the contingency, however, that existing liens cannot be displaced in its application. The principle of law governing the question in dispute is thus briefly stated by the commissioners: "A mortgage covering after-acquired property attaches to such property as it is acquired by the mortgagor. Where such property remains separable and susceptible of separate ownership the mortgage only attaches to the interest of the mortgagor therein, and does not displace existing liens thereon. Where, however, the after-acquired property becomes inseparably a portion of the real estate to which the mortgage has attached, the mortgage extends to such property, as in the familiar case of a house erected upon a lot burdened by a mortgage. In that case no one would now have the hardihood to claim under the statute that liens for the construction of the house should displace the mortgage, in the absence of special circumstances operating by way of estoppel. Perhaps the best elucidation of the whole question is found in the case of *Toledo etc. R. R. Co. v. Hamilton*, 134 U. S. 296, where Mr. Justice Brewer reviews the authorities, and holds that a blanket mortgage creates a lien whose priority cannot be displaced by a contract between the (railroad) company and a third party for the erection of

buildings or other works of original construction." In support of this view, and the rule that the lien created by a mortgage covering after-acquired property is not displaced by liens arising from improvements placed upon the mortgaged property: *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; *United States v. New Orleans R. R. Co.*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Car Co.*, 99 U. S. 256; *Myer v. Car Co.*, 102 U. S. 1. In *Thompson v. White Water Valley R. R. Co.*, 132 U. S. 68, a mortgage covering after-acquired property was decided to be superior to liens arising from furnishing money for the construction of a portion of a railroad upon the profits of that portion constructed within the original charter of the railroad. The commissioners, in reviewing and distinguishing the authorities relied upon to establish the converse of the above doctrine, say: "The case of *Brooks v. Burlington etc. R. R. Co.*, 101 U. S. 443, was decided upon the statutes of Iowa, which, in terms, allow to mechanics a lien upon the building, erection, or improvement prior to that of a pre-existing mortgage upon the land. Our statutes are not in this respect similar to those of Iowa. *Williamson v. New Jersey S. R. R. Co.*, 28 N. J. Eq. 277, 29 N. J. Eq. 311, is much relied upon by appellees. In that case certain docks were constructed for the Long Branch & Seashore Railroad Company, and the lien claim was filed against the New Jersey Southern company as builder and the Seashore road as owner. The Southern company seems to have owned a controlling interest in the stock of the Seashore company, but there had been no consolidation of the roads, nor any formal purchase or conveyance. The lien for the construction of the docks was held to be superior to a blanket mortgage given by the New Jersey Southern company, and this priority was established upon the ground that the mortgage of the Southern company attached to the whole of the property of the Seashore company, subject to existing liens. It is plainly intimated that, had the work been done for the Southern company upon land then owned by it, the decision would have been different.

"In *Botsford v. New Haven etc. R. Co.*, 41 Conn. 454, the lien was for the construction of a depot upon land whose owner agreed to give it to the company, provided that it would build a depot thereon. No conveyance was in fact made, and the lien for construction was held superior to a blanket mortgage upon the railroad, because the legal title had never vested in the railroad, and the equitable title did not vest in it until the depot was completed and after the lien attached.

"In *Farmers' Loan & Trust Co. v. Canada etc. R. R. Co.*, 127 Ind. 250, the court expresses a grave doubt as to whether, under the law of Indiana, a mortgage can be made to attach to after-acquired property in any event, and the authority of the case upon this question is weakened by the existence of that doubt. Moreover, the court disclaims any attempt to lay down a general rule, but holds that under the special facts of that case the construction lien was superior to the mortgage, and the court was undoubtedly right in its conclusion. The bonds, to secure which the mortgage was given, were issued to a construction company, and the court held that this construction company could not set up the bonds given to it under these circumstances as superior to the liens of materialmen for debts which the construction company itself owed them. It appeared that the construction company had hypothecated a portion of the bonds; but when, where, and to whom these bonds had been pledged did not appear, and the court could not, in that litigation, consider the rights of the pledgees.

"In the *Farmers' Loan & Trust Co. v. Kansas City etc. R. R. Co.*, 53 Fed.



Rep. 182, Judge Caldwell, in an exceedingly lucid, vigorous, and learned opinion, discusses the relative equities of such mortgages and liens, but (as far as the case is analogous to this) upon the basis of what the law ought to be, rather than what it has heretofore been declared to be, and gives priority to certain liens as against a mortgagee of the railroad, because of conditions imposed upon the mortgagee in the appointment of a receiver at its instance, the conditions receiving the assent of the mortgagee. While we are not disposed to question the correctness of the abstract opinions expressed by Judge Caldwell, nor of his determination of the law as applied to that case, his conclusions are not applicable to this case, where the mortgagee stands upon its vested rights, and has not consented to any displacement of its lien, nor asked the court for any relief authorizing the court to impose upon it similar conditions."

But the appellees contend, notwithstanding the principles contended for in this opinion, "they cannot be urged in support of this mortgage, because the bonds, to secure which the mortgage was given, were not in the hands of *bona fide* holders for value. We can see no force in this contention. In one sense it might be said that the investment company does not occupy the position of a *bona fide* holder; that is, it took the bonds with full knowledge of the facts. It knew that the railroad had not been constructed; it was bound to know that, under the law, persons furnishing material or performing labor in the construction of the road might become entitled to liens thereon; and if the rights of the bondholders depended upon their ignorance, at the time of receiving the bonds, of outstanding equities in favor of third persons, they certainly could not be considered *bona fide* holders without notice. But their rights do not depend upon their establishment of such ignorance. The investment company is a holder for value. It has advanced the whole loan of \$260,000, and we take it that no one will question the doctrine that a pledgee of such securities is a holder for value to the extent of the indebtedness for which they stand pledged. The case of *Farmers' Loan & Trust Co. v. Canada etc. R. R. Co.*, 127 Ind. 250, is not opposed to this view. The pledgees in that case were not protected, because, in the language of the court, there was no evidence as to 'when, where, or to whom these bonds had been pledged.' The investment company advancing its money in good faith, and promptly recording its mortgage, had a right to rely upon its priority in time, and the lienors, by the record of that mortgage, were notified of the existence of its lien, and entered into their contracts and into their performance with such notice. Many of the cases in the supreme court of the United States heretofore cited support this view: See, too, on this point, *Henry v. Fisherdict*, 37 Neb. 207.

"The majority opinion is largely based upon the conclusion that the investment company made itself a promoter or principal in the construction of the road. This conclusion is reached upon the doctrine first established in this state in the case of *Bahn Mfg. Co. v. Kountze*, 30 Neb. 712. The principle decided in that case has recently been much discussed in the cases of *Pickens v. Plattsmouth Investment Co.*, 37 Neb. 272; *Holmes v. Hutchins*, 38 Neb. 601, and *Sheehy v. Fulton*, 38 Neb. 691; post, p. 767. It is not necessary to repeat that discussion. We do not think the facts of this case warrant the court in applying that doctrine. Wherever it has been applied it has been for the purpose of charging the estate of the owner in fee on account of improvements made by his executory vendee. The court has in all cases for its application required the proof of facts sufficient to create the vendee the agent of the vendor expressly or by implication. In

application to this case requires a far-reaching extension of the principle. The investment company had no estate in the railroad company; it was not even a stockholder in the corporation, and we do not think it can be deemed an 'owner' within the meaning of the mechanics' lien law. It is true that the investment company in making the loan insisted upon the method to be adopted for the construction of the road, and had extended negotiations with its promoters in regard to the organization of the company and the form of the loan and its security. We cannot see in these acts any thing more than precautionary measures to secure the loan about to be made, and we believe that if the opinion of the majority is adhered to in future cases, and carried to its logical conclusion, every one who lends money to another with the knowledge, or at least with the intention, that the borrower shall use the money to erect improvements upon land pledged to secure the debt, must be held to have rendered his security subject to any mechanics' liens arising out of the construction. This result would be contrary to the reason of past adjudications, and we think unwarranted in principle."

**MORTGAGES AND MECHANICS' LIENS.—PRIORITY:** See *Central Trust Co. v. Continental Ironworks*, 51 N. J. Eq. 605; 40 Am. St. Rep. 539; *Saunders v. Bennett*, 160 Mass. 48; 39 Am. St. Rep. 456, and *Hazton etc. Heater Co. v. Gordon*, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note, with the cases collected.

**ACTIONS—ABATEMENT—SUIT PENDING IN FEDERAL COURT.**—An action will not be abated in a state court on the ground that another action is pending in a federal court for the same matter and between the same parties, nor will an action in a federal court be abated by the pendency of an action in a state court: Extended note to *Plume etc. Mfg. Co. v. Caldwell*, 29 Am. St. Rep. 312, where the cases are collected.

#### **Of the Waiver of Mechanics' Liens by Taking Notes, or Other Securities.**

If one having a right to a mechanic's lien takes a note or other written obligation of his debtor for the amount of the demand, or receives from him the notes of third persons, or other securities for such demand, and subsequently commences a suit for the enforcement of the lien, he is likely to be met with the defense that the lien has been waived. In the case first supposed, the defense cannot be sustained except upon the theory that the giving of the note is a payment or discharge of the original indebtedness, and a consequent extinction of the lien which existed to enforce its payment. There is now, however, no doubt that when a person indebted to another gives the latter a note or notes for the amount of the indebtedness, they are not to be treated as payments unless the parties have directly agreed that such shall be their effect. They do not discharge the original indebtedness in any respect, though they may extend the time for its payment. After the lapse of the time specified in the notes, if they remain unpaid, the holder is again at liberty to sue and recover upon the original indebtedness: *Mitchell v. Hockett*, 25 Cal. 542; 85 Am. Dec. 151; *Welch v. Allington*, 23 Cal. 322; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 20; *Higgins v. Wortell*, 18 Cal. 333; *Blunt v. Walker*, 11 Wis. 334; 78 Am. Dec. 709; *Weakly v. Bell*, 9 Watts, 273; 36 Am. Dec. 116.

A change in the form of the indebtedness is neither a payment thereof nor a waiver of the lien. Hence, though a personal judgment has been recovered against the debtor, a suit may subsequently be prosecuted to

enforce the lien: *Germania B. & L. Assn. v. Wagner*, 61 Cal. 355; *Kirkland v. Hoxie*, 95 Mich. 62; 35 Am. St. Rep. 549.

The taking of a note does not waive the lien, even though it does not become payable until after the time when the claim of lien must be filed: *Goble v. Gale*, 7 Blackf. 218; 41 Am. Dec. 219, and note; *Ashdown v. Wood*, 31 Mo. 465; *McMurray v. Taylor*, 30 Mo. 264; 77 Am. Dec. 611; *Graham v. Holt*, 4 B. Mon. 61; *Steamboat v. Hammond*, 9 Mo. 58; 43 Am. Dec. 536; *Bailey v. Hull*, 11 Wis. 289; 78 Am. Dec. 706; *Hughes v. Tanner*, 95 Mich. 113; *Baxter v. Nordyke*, 25 Kan. 222; *Hogland v. Lusk*, 33 Neb. 376; 20 Am. St. Rep. 485; *Chisholm v. Williams*, 128 Ill. 117.

Though he who is entitled to a mechanic's lien receives the notes of his debtor under an agreement that it shall be regarded as a payment, still it appears that this agreement is impliedly conditional, the condition being that the notes so received shall be paid when they become due, and therefore upon default in the payment of a note or of one or two or more notes, in case several are received, the plaintiff's cause of action upon the original indebtedness revives, and becomes enforceable to the same extent as if no notes had been given: *Orary v. Bowers*, 20 Cal. 88; *Crawford v. Roberts*, 50 Cal. 236.

When we come to the case of a person entitled to a mechanic's or a materialman's lien receiving security therefor in any form we meet a distressing conflict of authority, but are convinced, after an examination, that many of the authorities cited in support of the doctrine that the statutory lien of the mechanic or materialman is waived by receiving any other security do not, in fact, support that doctrine, and that the decided majority of the decisions relevant to the question deny that such statutory lien is waived by taking other security, unless from other attendant circumstances the court is satisfied that there was an actual intention and understanding that such lien should be waived. In section 1519 of Jones on Liens it is said: "Generally, it may be said that a lien is waived by taking collateral security for the debt which by operation of the statute might be secured by the lien. This is upon the ground that the taking of other full security is inconsistent with the idea of there being a mechanic's lien upon the land for the same debt; or, in other words, the taking of such other collateral shows an intention to waive the security afforded by the statutory lien. It is immaterial what such security be, if only it be a distinct security. It may be a mortgage of the same or other property, or a pledge, or the obligation of a third person, or a chattel mortgage." We purpose examining the authorities cited with the view of ascertaining how many of them support the application of the rule thus announced to mechanics' or materialmen's liens. The first case cited by Mr. Jones is *Phelps v. The Camilla*, Taney, 400. This did not involve a lien of the class here under discussion. It was a libel for materials furnished by the libellant to the defendant vessel at New York, and the decision was that if the party did not choose to rely on the contract which the maritime law imposed in such cases, but took an express written contract, he must rely on the contract he made for himself, and cannot, upon a change of intention, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied. The next case was the *St. Jago de Cuba*, 9 Wheat. 409, 416. It was also a case in admiralty in which the waiver of the lien was neither claimed nor denied, and it is no respect relevant to the question here under consideration. *Grant v. Strong*, 18 Wall. 623, was, it is true, a suit to enforce a mechanic's lien, but the original contract between the parties, under which the com-

complainant had furnished materials and performed labor in the construction of sixteen houses, had provided that he should in payment receive a conveyance of one of the houses and the ground upon which it stood, and such conveyance had been actually executed and left in escrow to be delivered to him upon the performance of his contract. Afterwards the parties changed the original contract, and, instead of stipulating for payment to be made in the house and lot, the promissory note of the landowner was received, payable three months after the completion of the work, and subsequently a further writing was executed between the parties, reciting that the work had been finished and measured, the promissory note given according to the contract, and that the escrow was null and void. In the opinion of the supreme court of the United States this was not a case involving the waiver of a lien, but one in which the parties by their original contract had intended should not be secured by any lien whatever, and the real question was whether the subsequent agreements had so changed the contract that a lien might arise where none was intended. Upon this point the court said: "We do not think that the giving up of the escrow, and the taking of the note in its place according to the terms of the agreements previously made, and which obviously do not look to a mechanic's lien as a part of the transaction, would create a lien where none existed before. In short, we are of opinion that these agreements show an acceptance and reliance by Strong on another and very different security for the payment of his work inconsistent with the idea of a mechanic's lien, and that no such lien ever attached in the case." *McMurray v. Brown*, 91 U. S. 257, is also relied upon by Mr. Jones. That case appears not altogether reconcilable with the one last cited, for it sustained and enforced a lien where the parties had originally intended that payment should be made in other property. The complainant had furnished materials to be used in the construction of certain buildings, for which the defendant had agreed to convey him certain real property in payment, and though the property owner refused to abide by his contract and make a conveyance as stipulated, he insisted that there was a special agreement inconsistent with the enforcement of a mechanic's lien. The court, after referring to some cases apparently sustaining the contention of the defendant, determined that they were unsound, and affirmed the right to enforce the mechanic's lien, saying: "Contracts of a special character, such as to give a mortgage to the laborer or mechanic, if duly executed, under circumstances showing that the claim of a lien was not intended by the parties, may defeat such claim; but the mere promise to give such security, if subsequently broken, will not impair such a right if the requisite notice is given before any right of a third person, as by attachment or conveyance, has become vested in the premises. Laches in that behalf may impair such a right, and it is one which the claimant may waive." The next case cited is that of *Willison v. Douglas*, 66 Md. 99. In that case it appeared that the party in whose favor the right to a lien was claimed had agreed to accept payment of the balance due him in a mortgage payable in two years, and bearing interest at the rate of five per cent per annum. At the proper time the landowner tendered the mortgage as provided by the written agreement, and, upon a refusal to accept it, offered to pay in money the balance due. For some reason not clearly stated both the money and the mortgage were refused, and a suit was brought to enforce a lien. The complainant had also entered into a bond under seal, in which he had agreed that no lien should be enforced against the premises. He was precluded, therefore, from maintaining his

suit both by the tender of payment in the mode stipulated and by the fact that he had himself given a bond against the possibility of such a suit, and whatever is said in the case about a waiver of a lien by a contract is addressed to the particular case and circumstances there in question. Subsequent decisions in the same state, hereafter cited and reported in this series, establish beyond all controversy that the taking of other security does not in Maryland waive the right to a lien. The case of *Muir v. Cross*, 10 B. Mon. 277, was a suit to enforce a vendor's lien, and therefore not relevant to the question here under consideration. In *Barrows v. Baughman*, 9 Mich. 213, a written agreement executed by the parties provided that the sum which should become due the complainant should be paid within five years after his work was completed, with interest at eight per cent per annum, and that a bond should be given, secured by a mortgage upon the premises on which the work was done and material furnished, and the court decided that as the contract provided upon its face for a mortgage security on the same land which would otherwise be subject to the lien, that this agreement and the security therein mentioned were entirely inconsistent with the idea of a mechanic's lien upon the same land as security for the same debt. The case of *Trullinger v. Koford*, 7 Or. 228, 33 Am. Rep. 708, was similar to the case last cited, except that the mortgage which the complainant had agreed to take had actually been given. The only doctrine then for which the case is necessarily authority is, that when the mechanic or materialman accepts a mortgage on the same property to which his lien attached, that the former shall be regarded as a waiver of the latter. It is true, however, that there is a *dictum* in the case apparently conceding that the same rule would extend when the mortgage lien was taken upon other property. In the case of *Weaver v. Demuth*, 40 N. J. L. 238, the complainant had agreed to accept in payment mortgages on the property sought to be subjected to the lien, and the decision is in harmony with and based upon that of the case from 9 Michigan hereinbefore cited. In *Dutton v. New England & Ins. Co.*, 29 N. H. 153, an action upon a policy of insurance was defended upon the ground that the policy was void because of the existence of an encumbrance upon the property, consisting of a mechanic's lien thereon. The existence of this encumbrance was denied, because it affirmatively appeared that the claim in favor of the mechanic or materialman had been discharged by the giving to him of the promissory note of a third person which he had taken in satisfaction of his demand.

We think the cases hereinbefore cited and relied upon by Mr. Jones, as well as the case of *Gorman v. Sagner*, 22 Mo. 137, also cited by him, do, indeed, support the contention that where a person otherwise entitled to a mechanic's lien has taken or agreed to take a mortgage or a trust deed upon the property otherwise subject to the lien, that the lien is thereby waived, especially if the time for the payment of his demand is by the bond or note which he gives extended beyond the time in which a mechanic's lien could be enforced. As was said by the supreme court of Missouri in the case last cited: "Where a mechanic's lien exists for a debt, if the giving of a deed of trust to secure the payment at a future day of notes executed for that debt, when that deed covers the identical property covered by the lien, is not a waiver of the lien, it would be difficult to say what act by implication of law would constitute such a waiver."

The decisions in Illinois do, however, beyond all question, sustain the rule as stated by Mr. Jones, and insist that the taking of any kind of collateral security is an implied waiver of mechanic's or materialman's lien: *Clark v.*

*Moore*, 64 Ill. 280; *Kankakee Coal Co. v. Crane etc. Co.*, 138 Ill. 208; *Kinzey v. Thomas*, 28 Ill. 505. In several of the states statutes of substantially the same effect have been adopted and are in force: Dak. Code Civ. Proc., sec. 654; Ga. Code, 1882, sec. 1979; Ky. Gen. Stats. 1883, c. 70, sec. 5; N. Mex. Comp. Laws 1884, sec. 1538; Iowa Laws 1876, c. 100, sec. 2.

With the exception of the cases in the supreme court of Illinois we believe there are none necessarily affirming that the taking of collateral or other security is an implied waiver of a mechanic's or materialman's lien, except, perhaps, where such security consists of a mortgage or trust deed upon the property otherwise subject to the lien. The general rule respecting the waiving of a lien by taking security is thus stated by Mr. Jones at section 1011 of his work on Liens: "The mere taking of a security for the amount of a debt for which a lien is claimed does not ordinarily destroy the lien. To have this effect there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and destructive of it." This rule, rather than the one hereinbefore quoted from his work, is the one applicable to mechanics' liens according to the decided weight of authority. It is also the rule of the principal case. In a recent case arising in Tennessee and decided by Jackson, now one of the judges of the supreme court of the United States, it appeared that machinery had been furnished, but it was claimed that he who furnished it had no right to a lien on the property to which it had been affixed, because he had stipulated that he should retain the title to the machinery with a right to take possession of and to remove it until actual payment was made, and it was claimed that this was a reservation inconsistent with, and therefore an implied waiver of, his lien. After referring to the facts of the case the judge said: "The retention of the title till payment was made for the machinery was in no way inconsistent with the statutory lien given upon the lot of ground or tract of land. The purpose of the stipulation was to secure the payment of the purchase money to be paid for the machinery. The retention of title was in the nature of a specific lien upon the identical machinery furnished. It was not inconsistent with the lien given by the statute upon the premises on which the machinery was placed or erected. Nor does it, as a matter of law, show any intention of waiving the latter lien. Retaining title as a means of securing payment on the part of defendants did not impose upon complainant any duty or obligation to assert such title by resuming possession of the machinery. The complainant will still look to defendants personally for the payment of the purchase price of the machinery, and to any and all other remedies conferred by law to enforce its payment. Instead of being inconsistent, it was merely additional security to that provided by the statute." As against the supreme court of Illinois are the decisions of the supreme courts of Arkansas, Georgia, Maryland, Minnesota, Mississippi, Nebraska, Pennsylvania, Wisconsin, and the national courts as represented in the opinion of Judge Jackson hereinbefore quoted: *Hinchman v. Lybrand*, 14 Serg. & R. 32; *Parberry v. Johnson*, 51 Miss. 291; *Ford v. Watson*, 85 Ga. 114; *Howe v. Kindred*, 42 Minn. 436; *Roberts v. Wilcoxson*, 36 Ark. 356; *Hoagland v. Lusk*, 33 Neb. 376; 29 Am. St. Rep. 485; *Allis v. Meadow Springs etc. Co.*, 67 Wis. 22; *Maryland B. Co. v. Spillman*, 76 Md. 337; 35 Am. St. Rep. 431, and the principal case. These cases all maintain that there is nothing in the act of taking a guaranty, mortgage, or other collateral security at all inconsistent with the retention of any statutory lien given to the mechanic or materialman, and that, before any waiver on his

part of his lien can be affirmed, there must be evidence showing his intention to rely solely upon the collateral security taken by him.

Some of these decisions refer to the fact that cases cited in support of the waiver of a mechanic's lien were those involving vendor's and other equitable liens, and point out that a distinction exists between such liens and the statutory lien given to mechanics and materialmen, and that the waiver of the latter's lien cannot be implied from the same facts and circumstances which might justify an implication of the waiver of the former. Thus, in the case of *Hinchman v. Lybrand*, 14 Serg. & R. 32, where it was insisted that the complainant could not enforce a mechanic's lien because he had taken a guaranty from a third person, the court said: "The counsel for the defendant relied on the case of *Kaufelt v. Bower*, 7 Serg. & R. 84, 10 Am. Dec. 428, in which it was decided by this court that if the vendor of land takes a bond for the purchase money the land is discharged. But that case is very different from the present, because any lien which the vendor may have is altogether of an equitable nature, and will not be enforced where, from the circumstances of the case, there is probable ground for supposing that it was not the intent of the parties that the purchase money should be a charge on the land. But here the lien is strictly legal and expressly given by the act of assembly, so that we ought not to consider any act except a plain one as a waiver or release. The plaintiff asks no more than payment of a debt which is not disputed. When he accepted the guaranty of Smith he did not say that he relinquished his lien, and I am of opinion that the law did not extinguish it by implication." So in *Parberry v. Johnson*, 51 Miss. 291, in which it appeared that the complainant had taken a trust deed to secure, among other matters, the claim upon which the lien was based. The trial court instructed the jury "to find for the plaintiffs, unless they should believe from the evidence that the deed of trust was accepted by plaintiffs in satisfaction and payment of their claim." The jury nevertheless returned a verdict for the plaintiffs. Thereupon the defendant prosecuted a writ of error, claiming that the instruction thus given was erroneous. The appellate court, nevertheless, sustained the instruction, saying, among other things: "The mechanic's lien is specific; it is covered by statute. While it might be abandoned, it cannot be likened to a mere equitable lien which is waived by taking other security." "The jury found that there was no agreement to accept the deed of trust as an accord and satisfaction of the claim in controversy, nor was it so accepted in fact; and, substantially, that there was no agreement of waiver, nor waiver in fact. Looking at the face of the trust deed, therefore, by which the case must be determined, a correct result was reached in the court below."



# SHEEHY v. FULTON.

[38 NEBRASKA, 691.]

**MECHANICS' LIENS—VENDOR'S LIEN—PRIORITIES—EVIDENCE.**—Under an executory contract for the sale of a lot, and a contemporaneous joint arrangement between vendor and vendee, whereby a building is to be erected on the lot from the proceeds of a loan thereon, obtained by the vendee, and, out of the proceeds of the same loan, the vendor is to receive the purchase money, mechanics' liens for improvements erected on the lot by the vendee are prior and superior to the vendor's lien for the unpaid purchase money, and, although such joint arrangement does not appear in the contract of sale, it may be established by parol evidence.

**STATUTE OF FRAUDS—MEMORANDUM.**—Verbal promise upon a sufficient consideration to answer for the debt of another is taken out of the operation of the statute of frauds by the subsequent execution of a sufficient promise in writing, although no new consideration passes.

*Marquett, Dewees & Hall*, for the appellant.

*F. A. Boehmer, W. A. Williams, Talbot & Bryan, T. S. Allen, and Stevens, Love, Cochran & Teeters*, for the appellees.

693 IRVINE, C. Upon September 25, 1890, the plaintiff contracted to sell a lot in the city of Lincoln to the defendant Fulton, five dollars of the purchase price being paid in cash and the remainder, three thousand four hundred and ninety-five dollars, to be paid November 1, 1890. The construction of a building upon the lot was begun by Fulton a few days after the execution of this contract. This suit was brought by the plaintiff to foreclose his lien for the purchase money. A number of defendants set up mechanics' liens, growing out of the performance of labor and furnishing of material for the building. The decree of the district court established these liens as prior to the plaintiff's lien for the unpaid purchase money. The principal controversy is as to the propriety of the decree in so subordinating the vendor's lien to the mechanics' liens. The mechanics' lienors, to support the decree, rely upon the doctrine of *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719. The plaintiff contends: 1. That no agreement charging the owner of the fee appears in the written contract of sale, and that parol evidence was inadmissible to establish such agreement; 2. That the evidence admitted was insufficient to show such an agreement.

694 As to the first contention, it is to be observed that the controversy here is not between the parties to the written contract. The lienors, being strangers to that contract, are

not bound by the terms of the writing; but they are at liberty to enforce the real understanding and contract between the parties, the question being not whether there was an agreement between the vendor and vendee capable of enforcement between them, but whether the vendor by his acts had constituted himself a principal in the construction of the building, and so charged his estate in the land.

As a preliminary to a consideration of the other branch of the question, that is, the sufficiency of the evidence to bring the case within the rule of *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, we think it is proper to say that in some instances that rule seems to have been misunderstood. An impression seems to have been created that the general effect of *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, and *Millsap v. Ball*, 30 Neb. 728, was to charge the vendor's estate in every case where by the nature of his contract or otherwise he has knowingly permitted the erection of a building by the vendee upon the land sold. A proper understanding of these cases leads to no such conclusion. The true rule is well stated in the case of *Pickens v. Plattsmouth Investment Co.*, 37 Neb. 272, as follows: "By this it was not held that where the owner of the land sells it, and simply takes back a mortgage for the purchase price, without in any way becoming a party to a contract for the erection of improvements, that one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary it has been recently held by this court in *Henry v. Fisher*, 37 Neb. 207, where one furnished money to build a house for which he took a mortgage upon the premises whereon the erection was to be made, that the record of such mortgage gave a priority to the rights of materialmen and mechanics who began to confer value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject matter of the sale to the claim of a mechanic's lienor, it must appear, that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be implied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material. It must be established by the proofs, or as fairly inferable from the

facts as any other independent fact or proposition." The real question in this case then was, whether or not such a privity had been established here between lienor and vendor under the rule as above stated. Upon this point there was evidence tending to show that when the contract of sale was made it was understood between the parties that the building should be erected; that the purchase price of the land was to be paid out of the proceeds of a loan which had been negotiated or which it was understood could be made upon the security of the property, but that the loan could not be consummated until the excavations of the building were made and the foundations were in. It was for these reasons that a nominal payment of five dollars was accepted, and that the whole of the remainder of the purchase money was to be paid November 1st, it being understood that at that time the building should have advanced far enough to permit the consummation of the loan. There was also evidence tending to show that the vendor endeavored to have the vendee substitute other contractors for those who were performing the work, because the latter were proceeding so slowly that a completion of the transaction could not be had within the stipulated time. There was also some evidence tending to show that the vendor exercised some control or direction over the building operations, but this evidence is of an uncertain character, and leaves it very doubtful as to whether the vendor intended <sup>696</sup> more in these matters than to prevent the vendee from encroaching upon other land of the vendor, and to advise the vendee in some particulars. Such evidence is, therefore, of very little weight; but the evidence already adverted to, if believed, would lead to the conclusion that the transaction was a joint arrangement between vendor and vendee, whereby a building should be erected from the proceeds of a loan obtained by the vendee, and out of the proceeds of the same loan the vendor should receive the purchase money of the lot. When one sells land to another and places that other in possession, in the absence of any restrictive covenants there is always an implied license that the vendee may make improvements on the land. The expression of direct authority to do so, independent of other circumstances, would not charge the vendor's estate; but accepting the evidence already referred to, there was in this case not merely an implied or expressed permission to construct the building, but a distinct arrangement between the parties that the building should be

constructed, and this, so far as the vendor was concerned, was for the purpose of obtaining funds out of which he should be paid for the land. While the case is near the border line, we think these facts were sufficient to sustain the trial court in finding that the vendor had established the vendee as his agent in the building operations sufficiently to charge the vendor's estate with the burden of mechanics' liens arising out of such construction. Indeed, the case in this view would be closely analogous to the case of *Millsap v. Ball*, 30 Neb. 728. We conclude, therefore, that the court did not err in admitting parol testimony as to this arrangement, and that its findings are supported by the evidence.

Complaint is made because of the court's entering a personal judgment against the plaintiff on the claim of the Pomeroy Coal Company. Upon this claim there is evidence tending to show that the Pomeroy Coal Company refused to extend credit to the vendee for certain materials <sup>607</sup> which he desired to purchase for the foundation of the building; that the vendor then went with the vendee to the agent of the coal company, and told him to furnish the material as it was going upon his (the vendor's) land, and that "he would protect" the coal company for the material. Subsequently, and after the material was furnished, the vendor signed a written instrument whereby he agreed "to protect Pomeroy Coal Company in case they have to take a lien for stone, lime, and sand sold to H. Fulton." It is claimed that this portion of the agreement was fraudulently inserted after it was signed by the vendor; but we think the evidence justified the trial court in finding that such was not the fact. Taking the plaintiff's evidence upon this point, it would appear that when he signed the agreement it was left incomplete, in order that the correct description of the property might be inserted, and that he signed some distance below the part already written, in order that this might be filled in. In view of the relations of the vendor to the contractors already referred to it is probable that in any view of the case the agreement to pay the Pomeroy Coal Company must be considered an independent and not a collateral promise. Still, viewed as a collateral promise, the memorandum satisfies the statute of frauds. It is said that there was no consideration for the written memorandum. The consideration for the promise was the original sale and delivery of the material; and it is too well established to justify us in refer-

ring to authorities that the statute of frauds relates only to the form of evidence, and a writing made after the transaction, if otherwise sufficient, renders such promise enforceable, although no new consideration passes.

Judgment affirmed.

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**MECHANIC'S LIEN—VENDOR'S LIEN—PRIORITY.**—A mechanic's lien prevails over that of a vendor, and attaches to his title where he has not conveyed the property, if the contract of sale provided that the vendee should go on and build on the premises: *Henderson v. Connelly*, 123 Ill. 98; 5 Am. St. Rep. 490. A mechanic's lien for improvements erected on land under a contract with a purchaser holding a bond for a conveyance, under the statutes of 1825, is subordinate to the vendor's lien for the unpaid purchase money: *Gillespie v. Bradford*, 7 Yerg. 168; 27 Am. Dec. 494. And the same rule prevails under the Wisconsin statutes: *Rees v. Ludington*, 13 Wis. 276; 80 Am. Dec. 741. See, also, the extended note to *Loonie v. Hogan*, 61 Am. Dec. 689.

**STATUTE OF FRAUDS—VERBAL CONTRACT—SUBSEQUENT MEMORANDUM.**—Written evidence of a contract required by the statute of frauds need not be contemporaneous with the contract. A written admission of a previous verbal contract will suffice: *Idle v. Stanton*, 15 Vt. 685; 40 Am. Dec. 698. Where a written memorandum of a verbal contract was made after a breach of the contract, but before an action for the breach, and was antedated as an original contract of the date of the verbal contract first made, it was held that the memorandum was sufficient to satisfy the statute of frauds: *Bird v. Munroe*, 66 Me. 337; 22 Am. Rep. 571. See, also, the extended note to *Neaves v. North State Min. Co.*, 47 Am. Rep. 533.

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## WELTON v. DICKSON.

[88 NEBRASKA, 767.]

**EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—A constitutional provision that the property of no person shall be taken or damaged for public use without just compensation is an implied prohibition on the power of the legislature to take the private property of one without his consent, even when compensation is made, and transfer it to another for his private use.

**EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—The want of power in the legislature to take the private property of one person and transfer it to another for his private use does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of sovereign power committed to the legislature. Property can only be taken for a public use.

**EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—The right of eminent domain does not imply a right in the sovereign power to take the property of one person and transfer it to another, even for full compensation, when the public interest is in no way promoted by such transfer.

**EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PRIVATE WAY.**—The legislature has no power to authorize the taking of the private property of one person, even for a full compensation, and the transfer of it to another for the purposes of a private road or way, when the public interest is in no way promoted by such transfer.

**EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PUBLIC USE.**—Private property cannot be compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.

**EMINENT DOMAIN—PUBLIC USE.**—When the public exigencies demand, the exercise of the power of taking private property for public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment; but what is such public use as will justify the exercise of the power of eminent domain is a question for the courts. If a public use is declared by the legislature the courts hold the use public, unless it manifestly appears from the act that it can have no tendency to advance and promote such public use.

**INJUNCTION—EQUITABLE JURISDICTION.**—The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction in petitions for injunction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed by the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

*N. Z. Snell, and Beeson & Root, for the appellants.*

*Pound & Burr, for the appellees.*

771 RAGAN, C. Chapter 78 of the Compiled Statutes of 1893, provides:

"SEC. 47. When the lands of any person shall be surrounded or inclosed, or be shut out and cut off from a 772 public highway by the lands of any other person or persons, who refuse to allow such person a private road to pass to or from his or her said land, it shall be the duty of the county board, on petition of any person whose land is so surrounded or shut out, to appoint three disinterested freeholders of the precinct or township, in counties under township organization, in which the land lies, as commissioners to view and mark out a road from land of the petitioner to the nearest public highway, and assess the damages the person will sustain through whose land the road will pass.

"SEC. 48. The person desiring to secure the right of way shall give the person or persons through whose lands the road will run at least two days' notice of such intended application, by leaving or causing to be left a written notice at his usual place of abode; and satisfactory evidence that such

notice has been given shall be presented to the board before commissioners shall be appointed.

"SEC. 49. The commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath before some judge or justice of the peace, that they are not interested nor of kin to either of the parties interested in the proposed road, and that they will faithfully and impartially view and mark out said road to the greatest ease and convenience of the parties, and as little as may be to the injury of either, and assess the damages which will be sustained by the party through whose land it will run.

"SEC. 50. Said commissioners shall make out a report of their proceedings, stating particularly the course and distance of said road, and the amount of damages assessed, which report, together with a certificate of the oath, shall be returned to the county commissioners and filed by the county clerk.

"SEC. 51. If the report be approved by the county board, and the petitioner shall produce satisfactory evidence that he has paid the damages assessed (or tendered payment, if <sup>773</sup> the party refuse to receive it), and all costs attending the proceedings, the county board shall grant an order to said petitioner to open a road not exceeding fifteen feet in width; and if any person or persons obstruct said road, such person or persons shall be liable to all the penalties for obstructing a public road; *provided, however*, if such road shall pass through any inclosure, and it shall be required by the owner thereof, the person applying for such road shall put up and keep at each entrance into such inclosure a good and substantial swinging gate; *provided, further*, that either party may appeal from the decision of the county board in like manner as prescribed in case of public roads.

"SEC. 52. Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever."

The board of county commissioners of Lancaster county, on the petition of Owen Marshall, and Aaron C. Loder, appointed three commissioners, who viewed and marked out a private road through the land of one Albert Welton, and made report of their proceedings to said board of county commissioners. Thereupon Welton brought this suit in the district court of Lancaster county to enjoin Marshall and Loder and the board



of county commissioners from laying out and establishing on his land the private road petitioned for. This suit is based on the grounds that the statute quoted above is unconstitutional, and that the threatened action of the defendants, if permitted, will work an irreparable injury to Welton, for which he has no adequate remedy at law. The appellants demurred to the petition on the ground that it did not state a cause of action. The court overruled the demurrer and entered a decree perpetually enjoining the board of county commissioners from establishing such private road on the lands of Welton. The case comes here on appeal.

The principal question in the case is the constitutionality 774 of the sections of the statute recited above. If B's land shall be shut off from public highways by the land of A, and he shall refuse to allow B a private road across his, A's, land, then this statute, against A's consent, takes a part of his land and transfers it to B, to be used as a private road by him, his heirs and assigns forever. Section 21, article 1 of the constitution of the state provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The uniform holding of the courts is that such a constitutional provision as this is an implied prohibition on the power of the legislature to take the private property of A without his consent, even when compensation is made, and transfer it to B for his private use.

The supreme court of the state of New Jersey, in *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, declares: "This want of power in the legislature does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature. To justify the taking of the citizen's property by the legislature the use for which it is appropriated must be a public use."

Speaking to this subject the eminent jurist, Cooley, says: "The right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power in any case to take the property of one individual, and pass it over to another without reference to some use to which it is to be applied for the public benefit. The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to

another, even for a full compensation, where the public interest will be in no way promoted by such transfer": Cooley's Constitutional Limitations, 6th ed., 651.

Now, is the use for which this statute authorizes the taking <sup>775</sup> of appellee's land a public or private one? Is the purpose of this law to take A's property and transfer it to B for the use of the public, or for B's private use? If the private road contemplated by this law is for the use of the public the law is good; if, on the other hand, the road authorized is for the private use and benefit of an individual, the law is void; and, whether one or the other, is a question of law. To make the use public, it need not be for the benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate: *Coster v. Tide Water Co.*, 18 N. J. Eq. 54.

Section 4511 of the Revised Statutes of Ohio provides: "The trustees of any township may, whenever in their opinion the same will be conducive to the public health, convenience, or welfare, cause to be established, located, and constructed, as hereinafter provided, any ditch within such township." Certain parties petitioned for the construction of a ditch across the lands of others under said statute. On the trial the court was requested to charge the jury as follows: "If you find that the petitioners . . . are the only persons in any way interested in the location of the ditch, and that it would not be conducive to public health, convenience, or welfare to locate the ditch in question, then, and in that case, you should return your verdict against the proposed ditch." The court refused to give this instruction, and the case was taken to the supreme court for review, and that tribunal say: "The facts being ascertained, the question whether or not a ditch will conduce to the public health, convenience, or welfare, within the meaning of the Revised Statutes, section 4511, so that it will be of public use, is a question of law": *McQuillen v. Hatton*, 42 Ohio St. 202.

In *Jenal v. Green Island Draining Co.*, 12 Neb. 163, was considered a statute of this state, authorizing the construction <sup>776</sup> of levees, dikes, and drains, and the reclamation of wet and overflowed lands by incorporated companies. The act provided, among other things, that the company might appropriate any land, stones, timber, gravel, or other materials

necessary for the right of way or construction, maintenance, or improvement of the proposed work by first paying into the county treasury of the county where the land is situate, for the use of the owner of the land, the amount of damage assessed by the appraisers who were appointed therefor. Chief Justice Maxwell, speaking for this court, said: "The statute in question authorizes the entry upon lands and construction of drains whenever the private interest of the corporation requires it, and without reference to the public welfare. Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others . . . . This is an infringement of the right of private property, and is unauthorized and void."

The general road law of this state, chapter 78 of the Compiled Statutes, 1893, confers on county boards of the several counties of the state general supervision over the public roads of the state, with power to maintain them; requires a petition for a public road to be signed by ten freeholders; fixes their width at sixty-six feet; makes the cost of their construction and maintenance a public charge; provides that when persons traveling with carriages shall meet on such roads each shall turn to the right of the center thereof; prohibits all persons addicted to the excessive use of intoxicating liquors from being employed as drivers on said roads; prohibits the running of horses on such roads; the leaving in such roads, unhitched or unguarded, any horses or teams; and that the overseer of each road district shall annually cause furrows to be plowed on either side of all such roads, as fire guards. None of these provisions are found in this act in reference to private roads, and none <sup>777</sup> of these provisions apply to private roads. Had the legislature intended that these private roads should be for the public use, then, indeed, the entire private road act would be superfluous; but the law we have under consideration expressly provides: "Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever": Comp. Stats., c. 78, sec. 52. The fact that the legal title is not taken, but an easement created, does not render this law less objectionable; for what value is one's legal title if another have the possession and use forever? Marshall and Loder would acquire no greater estate to the land in question if

Welton gave them an absolute warranty deed. The public have an easement in all public roads, while the legal title remains in the adjoining owner, but by this law no right in or to the private road is conferred on the public. This law is, and was intended to be, an act for the transfer of A's property against his consent, compensation being made to him, to B, his heirs and assigns, for their private use and convenience, and is, therefore, in conflict with the implied prohibitions of the constitution, and void.

In *Bankhead v. Brown*, 25 Iowa, 540, the question of the constitutionality of a private road law was decided. By the statute considered in that case it was provided:

SECTION 1. Private roads may be laid out in the same manner as county roads, and the general road laws of the state as to the establishment of county roads are applicable, except that it is not necessary that any person but the applicant shall sign the petition.

SEC. 2. That the board of supervisors may appoint a commissioner to report upon the application, and requires a bond from the applicant to pay all costs and damages.

SEC. 3. That no such road shall be ordered to be opened until the costs and damages have been paid and the conditions on which it is established shall have been complied with by the applicant.

<sup>778</sup> SEC. 4. That on the final hearing the board may receive petitions for and against the proposed road, hear testimony, and establish the road upon the payment of costs and damages, and upon such condition as to fences as to the board may seem just to all parties concerned.

It will be observed that the Iowa law is substantially the same as the one under consideration here, with the exceptions that the Nebraska statute contains no provisions allowing the board of county commissioners to receive petitions for and against the proposed road; and the Iowa statute has no provisions vesting the perpetual easement in the private road established in the party petitioning therefor.

*Bankhead v. Brown*, 25 Iowa, 540, arose out of an effort of Bankhead to have established a private road under the provisions of the Iowa law just quoted, across the land of Brown, in order to reach Bankhead's coal mine. The establishment of the private road was resisted by Brown on the ground that the law authorizing it was unconstitutional, in that it proposed the taking of private property for private uses. Dillon, C. J.,

delivering the opinion of the court, said: "With respect to the act, . . . we are of opinion that roads thereunder established are essentially private, that is, are the private property of the applicant therefor, because: 1. The statute denominates them 'private roads.' . . . If the roads established thereunder were not intended to be private and different from ordinary public roads, there was no necessity for the act; 2. Such road may be established upon the petition of the applicant alone, and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe; 3. The public are not bound to work or keep such roads in repair, and that is a very satisfactory test as to whether the road is public or private; 4. We see no reason, when such a road is established, why the person at whose instance this was done <sup>779</sup> might not lock the gates opening into it or fence it up, or otherwise debar the public of any right thereto. Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it. If the act . . . is valid, might not the plaintiffs, having procured the road, use it for laying down a tram or horse railway and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These considerations mark the great difference between such a road and a public highway, and demonstrate the essential private character of the road."

In the following cases acts substantially like the Iowa act providing for the establishment of private roads have been declared unconstitutional: *Nesbitt v. Trumbo*, 39 Ill. 110; 89 Am. Dec. 290; *Dickey v. Tennison*, 27 Mo. 373; *Clack v. White*, 2 Swan, 540; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 274; *Sadler v. Langham*, 34 Ala. 311; *Newell v. Smith*, 15 Wis. 101.

The language quoted above from the learned judge in reference to the Iowa law is applicable to the statute under investigation. The eminent jurist, commenting on the constitutional provision of the state of Iowa, "that private property shall not be taken for public use without just compensation," continues: "The limitation . . . upon the right

of eminent domain, or the power of the legislature to take private property for public use, is found in all, or nearly all, of the state constitutions. Many of the questions growing out of this limitation upon the otherwise practically, if not theoretically, absolute power of the legislature to take the property of one for the benefit of the <sup>780</sup> many have been settled by adjudication." And he deduces from the numerous authorities cited by him in the opinion the following propositions:

"1. The constitutional limitation above quoted prohibits by implication the taking of private property for any private use whatever without the consent of the owner.

"2. It forbids private property from being compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.

"3. When the public exigencies demand, the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.

"4. That what is such a public use as will justify the exercise of the power of eminent domain is a question for the courts. But 'if a public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use.'"

We are entirely satisfied with the reasoning and conclusions of this opinion, and follow it without hesitation. Statutes similar to the Nebraska law have been held invalid in the following cases: *Stewart v. Hartman*, 46 Ind. 331; *In re Albany Street*, 11 Wend. 149; 25 Am. Dec. 618; *Osborn v. Hart*, 24 Wis. 89; 1 Am. Rep. 161; *Crear v. Crossly*, 40 Ill. 175; *Sholl v. German Coal Co.*, 118 Ill. 427; 59 Am. Rep. 379.

Counsel for appellants in their brief cite us to many authorities to sustain the validity of the law assailed as invalid in this case. In some of the cases cited the statutes were held good on the ground that the general public had a right to use the private roads provided for by the statutes. Such was the ground of the decision in *Shaver v. Starrett*, 4 Ohio St. 495, and *Denham v. County Commrs.*, 108 Mass. 202.

In *Sherman v. Buick*, 32 Cal. 242, 91 Am. Dec. 577, the court sustained <sup>781</sup> the constitutionality of a law very similar to our own, but did so by holding that although the stat-

ute denominated the road a "private road," it was in fact and in law a public road, under the control of the government, and open to every one who might have occasion to use it; and the court declared that "the phrase 'private road' is unknown to the common law; all roads are public." The opinion, as counsel say, is ably reasoned; but we do not think this court can say that all roads are public roads in this state. The legislature has said that all public roads shall be sixty-six feet wide, and by the law we are considering it is provided that private roads shall be fifteen feet wide. Evidently, then, the legislature has attempted to recognize two classes of roads. If Marshall and Loder had opened the private road they sought to across Welton's farm, and had been indicted under the criminal statutes for running their horses on a public road of the state, and the proof had shown that the running of their horses was on a private road established under this private road law, can any one doubt that the jury would have been rightly instructed to acquit them?

Counsel for appellants also insist that appellee has an adequate remedy at law by appeal from the order of the board of county commissioners, should it make an order establishing the road, and that therefore this case must be dismissed. The law being invalid, the case of the appellee resolves itself into an appeal, on his part, to a court of equity to enjoin the appellants from committing a threatened trespass. The supreme court of Illinois, in *Poyer v. Village of Des Plaines*, 123 Ill. 117, 5 Am. St. Rep. 494, lay down the rule in such case thus: "There are, however, two exceptions, clearly recognized, to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise, which are: 1. To prevent irreparable injury; and 2. To prevent a multiplicity of suits. . . . Before a court of equity will interfere to prevent a trespass upon this ground, 'the facts and circumstances' must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy.'" In *Watson v. Sutherland*, 5 Wall. 74, the supreme court of the United States say: "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings." It is not enough that there is a remedy at law. It



must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. The facts averred in the appellee's petition show that the trespass threatened by the appellants, if committed, would cause appellee an injury, to the redress of which his legal remedy would be inadequate. The decree of the district court is affirmed.

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**EMINENT DOMAIN—TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—The legislature has no power to authorize the taking of private property for a private use without the owner's consent, even upon the making of just compensation therefor: *Wisconsin Water Co. v. Winans*, 85 Wis. 26; 39 Am. St. Rep. 813, and note with the cases collected, holding that the right of eminent domain should be exercised only when the uses for which the property is taken are strictly public.

**EMINENT DOMAIN—POWER OF THE LEGISLATURE.**—That the time, manner, and occasion for the exercise of the right of eminent domain is wholly within the control and discretion of the legislature, see *Wulzen v. Board of Supervisors*, 101 Cal. 15; 40 Am. St. Rep. 17, and note, and *Wisconsin Water Co. v. Winans*, 85 Wis. 26; 39 Am. St. Rep. 813, and note.

**INJUNCTION—EQUITY JURISDICTION.**—Inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of equity: *Carney v. Hadley*, 32 Fla. 344; 37 Am. St. Rep. 101, and note; *Pensacola etc. R. R. Co. v. Spratt*, 12 Fla. 26; 91 Am. Dec. 747, and note; *Goodrich v. Moore*, 2 Minn. 61; 72 Am. Dec. 74; and the same rule prevails in the case of mandatory injunctions: *Atchison etc. R. R. Co. v. Long*, 46 Kan. 701; 26 Am. St. Rep. 165, and note. Where there is a complete and adequate remedy at law an injunction should not be granted, or if granted, should be dissolved: *Brown v. Hoff*, 5 Paige, 235; 28 Am. Dec. 425; and see, further, on this subject, the note to *Janesville v. Carpenter*, 20 Am. St. Rep. 135.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NORTH CAROLINA.**

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**HUGHES v. WESTERN UNION TELEGRAPH COMPANY.**

[114 NORTH CAROLINA, 70.]

**TELEGRAPH CORPORATIONS—DAMAGES.**—If, through a mistake in the transmission of a telegram, the owner of property is induced to sell it for its then market value he suffers no damage, and cannot recover any, though when the property subsequently advanced in value he repurchased a part thereof at the advanced rate.

**ACTION** for damages alleged to have been sustained from an incorrect transmission of a telegram in cipher. As written it meant, "The market is firm, with upward tendency at close; cotton oil preferred three per cent; dividend will probably be declared May 3d," but, by an error in transmitting, the word "3d" was changed to "thirtieth." This telegram was dated April 21st. At that time plaintiff owned eight hundred shares of the preferred stock of the American Cotton Oil Company, on which on the 3d of May a dividend was declared. He, on receiving the telegram, sold five hundred shares of his stock. Soon afterwards, on learning of the mistake in the telegram, he repurchased three hundred shares at an advanced rate. The difference between the amount for which plaintiff sold his stock and the amount he could have gotten for it when he learned of the error in the telegram was ten hundred and twenty-five dollars. The court instructed the jury that the actual damages which the plaintiff could recover were limited to the amount paid for sending the message, and a verdict was therefore returned for fifty cents. The plaintiff moved for a new trial, and upon its denial appealed.

*M. De W. Stevenson and Busbee & Busbee*, for the plaintiff.

*Strong & Strong*, for the defendant.

<sup>74</sup> BURWELL, J. The plaintiff's allegation is to the effect that the defendant made a mistake in the transmission of a telegram directed to him and relating to the stock of the American Cotton Oil Company. He says that if the message had been delivered to him as his correspondent wrote it he would not have sold five hundred shares of that stock which he then owned, but that, being misled and deceived by the false information thus negligently furnished him by the defendant, he did sell those shares of stock.

If, because of defendant's negligence, the plaintiff had disposed of his property at less than its value there would be some foundation for the plaintiff's demand for damages above the cost of the telegram. But it appears that he got for his stock, when he sold it, "the market value" thereof. The "market value" of such property, nothing else appearing, is its value. It cannot be said that one suffers damage when induced to exchange his property for its value in money. He has, after the exchange, what to <sup>75</sup> the law appears to be the exact equivalent for that which he has sold.

But the plaintiff says that this class of stock advanced in price soon after he was so induced to sell, and that he bought three hundred shares at the advanced rate. The defendant cannot, we think, be held liable for this conduct of the plaintiff. It did not induce him to buy. As we have said, he suffered, it appears, no damage by reason of being induced by the erroneous message to sell. We cannot indulge in speculation as to what might or might not have happened if the telegram had been correctly transmitted. To do so would be to concern ourselves about speculative damages, which are not recoverable: *Pegram v. Western Union Tel. Co.*, 100 N. C. 28; 6 Am. St. Rep. 557; *Western Union Tel. Co. v. Hull*, 124 U. S. 444.

The view we take of this matter renders it unnecessary for us to consider the question whether or not there was any evidence that the defendant knew of the importance of the message and of the consequences likely to follow its incorrect transmission.

No error.

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TELEGRAPH COMPANIES—DAMAGES FOR ERROR IN TRANSMITTING MESSAGE.—For negligence in the transmission of a telegram the sender is

entitled to recover nominal damages, and such substantial damages as he has sustained which were naturally the proximate consequence of the wrongful act: *Pegram v. Western Union Tel. Co.*, 100 N. C. 28; 6 Am. St. Rep. 57, and note; *Western Union Tel. Co. v. Brown*, 84 Tex. 54. The measured damages for the negligent transmission of a telegram is compensation for the actual loss following as a natural and proximate consequence of the company's act: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109, and note; *International etc. Tel. Co. v. Saunders*, 32 Fla. 431. This question is thoroughly discussed in the extended notes to the following cases: *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 752; *Pepper v. Telegraph Co.*, 10 Am. St. Rep. 711; *Western Union Tel. Co. v. Graham*, 9 Am. Rep. 152; *Western Union Tel. Co. v. Blanchard*, 45 Am. Rep. 493, and *Griffin v. Colver*, 69 Am. Dec. 726.

## LEACH v. JOHNSON.

[114 NORTH CAROLINA, 87.]

**VENDOR AND PURCHASER—SPECIFIC PERFORMANCE.**—If the title is DEFECTIVE to property contracted to be sold or encumbrance against it existed, the purchaser will not be compelled to take the property nor to pay the purchase price, though he agreed to accept a deed without warranty.

**ACTION** upon bonds given for the purchase price of real property. Judgment for the defendant.

*Thomas N. Hill*, for the plaintiff.

*R. O. Burton*, for the defendant.

<sup>87</sup> CLARK, J. The facts admitted by the parties or found by the jury are that the plaintiff, personally, and not as agent for his wife, contracted to sell the land to the defendant for fourteen hundred and thirty-five dollars, of which two hundred dollars was paid in cash. Bonds were given by defendant for balance of purchase money, plaintiff giving him an obligation to make a deed without warranty on payment of said bonds. The defendant did not know that there were judgment liens on the land, and before discovering them he paid in all five hundred dollars on the bonds. <sup>88</sup> After discovering such liens he refused to pay more. Thereupon plaintiff tendered him a deed executed by himself and wife, and demanded payment. The defendant having refused to accept such deed and pay the balance of purchase money, the plaintiff brought this action, in which his wife did not join. The title to the land was in the wife, subject to judgment liens. The jury further find that the value of the land at the time of the sale to defendant was eight hundred dollars.

A different principle applies in the case of the discovery of encumbrances before the execution of the conveyance and afterwards. This is supported by an unbroken line of decisions: 2 Warvelle on Vendors, 943. The reason is that after the deed has passed the vendee must rely on his covenant; but before it has passed the law will not compel a man to take a defective title, especially when he has not contracted for any warranty or has agreed to take the title without warranty: *Butchelor v. Macon*, 67 N. C. 181; *Miller v. Feezor*, 82 N. C. 192; *Hughes v. McNider*, 90 N. C. 252; *Cox v. Jerman*, 6 Ired. Eq. 526; *Howard v. Kimball*, 65 N. C. 175; 6 Am. Rep. 739; *Motts v. Caldwell*, Busb. Eq. 289; *Castlebury v. Maynard*, 95 N. C. 281; *Kilpatrick v. Harris*, Phill. Eq. 222; *Clanton v. Burges*, 2 Dev. Eq. 13.

Unless the vendee has otherwise agreed it is his undoubted right to demand a clear title: 1 Warvelle on Vendors, 315. That the vendee agreed to take a deed without warranty is not a waiver of the right to demand a clear title; on the contrary, the fact that a warranty in the conveyance is waived is all the stronger reason why the vendee should insist upon the cancellation of all liens and encumbrances, since he will have no warranty to fall back upon if the title should prove to be defective. The vendee in such case is not cut off from his rights till he has paid the purchase money and taken the deed. The plaintiff contracted to <sup>89</sup> sell his own title. He had none. He now offers that of his wife. He thus seeks to perfect a title, but when he does so he must not offer a defective one: *Herren v. Rich*, 95 N. C. 500. It is true the defendant contracted by bond to pay the amount sued for; but the consideration is recited to be the conveyance of this land. The obligation on the part of the plaintiff to execute a conveyance without warranty is not an agreement on the part of the defendant to take a defective title. The agreement is simply that if the purchase money is paid, and the deed accepted, the vendee shall have action thereafter against the vendor if the title shall prove defective.

The homestead having been allotted, the lien of the judgments was not barred by the lapse of time when this deed was tendered nor when this action was tried, and the amount of such liens with interest and costs exceeded the value of the land as found by the jury.

No error.

**VENDOR AND PURCHASER—DEFECTIVE TITLE—SPECIFIC PERFORMANCE—** That the specific performance of a contract for the purchase of land will not be decreed, where the title is questionable, see the notes to *Friend v. Low*, 24 Am. St. Rep. 678; *Herman v. Somers*, 38 Am. St. Rep. 853; and *Hampton v. Speckmarg*, 11 Am. Dec. 709.

## HAYNES v. RALEIGH GAS COMPANY.

[114 NORTH CAROLINA, 202.]

**NEGLIGENCE—ELECTRIC WIRES IN STREETS.**—A corporation permitted to construct and maintain a line of electric wires in the public streets, for the purpose of private gain, owes the duty to persons upon such streets of so conducting its business as not to injure them. It must, therefore, keep its wires out of the way of persons using the streets so that they will not, by coming in contact with such wires, receive personal injuries.

**NEGLIGENCE—PRESUMPTION OF FROM INJURY FROM ELECTRIC WIRES.**—If a corporation is permitted to maintain electric wires in the public streets, and one of such wires is detached from a tree to which it has been fastened, and is hanging to the ground charged with a deadly current of electricity, which it received in coming in contact with the feed wire of another corporation, and a boy taking hold of the wire is killed, the corporation to which the detached wire belongs is presumed to have been negligent, and must assume, in an action for damages resulting from such killing, the burden of proving that there was no negligence on its part.

**NEGLIGENCE—ELECTRIC WIRES.—PROOF THAT THERE WAS A LIVE WIRE CARRYING A DEADLY CURRENT OF ELECTRICITY** down in the public streets raises the presumption that some one failed in his duty to the public.

**NEGLIGENCE.**—A CHILD is held to such care and prudence only as are usual among children of his age and capacity.

**NEGLIGENCE—CONTRIBUTORY, IN TAKING HOLD OF A LIVE ELECTRIC WIRE.** A child ten years of age is not chargeable with contributory negligence because he took hold of a wire in the street charged with a deadly current of electricity, if there was nothing from which even an adult could have inferred that the wire was carrying any current of electricity whatever.

**ELECTRIC CORPORATIONS PERMITTED TO USE THE PUBLIC STREETS** for their own purposes must be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances.

**NEGLIGENCE.—EVIDENCE** that there was published in the newspapers of the city a statement by an electric railway company that its current was not a deadly one is not admissible in favor of an electric corporation sued for damages sustained from one of its wires becoming detached, falling to the ground, and transmitting from the feed wire of the railroad company a deadly current with which a boy came in contact to the loss of his life. The defendant corporation had no right to act upon this statement without examination and further inquiry.

*Battle & Mordecai, W. N. Jones, and Strong & Strong, for the plaintiff.*

*Busbee & Busbee, Armistead Jones, and R. O. Burton, for the defendant.*

<sup>205</sup> BURWELL, J. John W. Haynes, the intestate of the plaintiff, was about ten years of age. He was "a very healthy, intelligent, moral, and industrious boy, well educated for his age." On the morning of November 15, 1892, he assisted his older brother, who was a carrier for a newspaper, and when returning home, about 7 o'clock, he took hold of a wire on or near the sidewalk over which he was passing, and was killed by an electric current. The place where this occurred was on North street, not far from its intersection of Blount street, in the city of Raleigh. The cause of his death is admitted, and also the fact that the deadly current came from the "feed wire" of the street railway company whose line was constructed along Blount street, as were also the electric light wires of the defendant. One of the defendant's poles stood on Blount street, and was supported by three guy wires—one attached to a tree on Blount street, and the other two to trees on <sup>206</sup> North street. The first of these guy wires (the one that was attached to the tree on Blount street) crossed and was in contact with the "feed wire" of the railway company. The longer one of the other two had become detached from the tree on North street, and was hanging to the ground. The current passed along these two guy wires and killed the boy as soon as he grasped the one that had fallen on or near the sidewalk.

These facts were testified to by the plaintiff's witnesses and seem not to have been controverted.

Among the special instructions asked by the plaintiff was the following: "Upon the evidence of the plaintiff, if believed, there is a presumption of negligence upon the part of the defendant, and in that case the burden is upon the defendant to show that there was no negligence on its part." His honor refused so to instruct the jury, and the plaintiff excepted.

Pretermitted for the present the consideration of the question whether the boy was guilty of contributory negligence in taking hold of the wire, we are brought by this exception to the inquiry, Does the expression *res ipsa loquitur* apply to the state of facts set out above, and do those facts make out a *prima*



*facie* case of negligence against the defendant, and cast upon it the burden of showing that it was not negligent?

Argument and authority are not needed to show that those who use the streets of a city, by permission of those who have power to grant such a privilege, for purposes of private gain, owe to persons upon such streets the duty of so conducting their business as not to injure them. To speak particularly of the matter now under consideration, the defendant company, using the streets of the city of Raleigh for its purposes as it was allowed to do, owed to the deceased the duty of keeping out of his way, as he went <sup>207</sup> about his business and to his home, all its wires, and especially the duty of preventing his exposure to contact with any wire placed in the streets by it that carried a current of electricity. It was the duty of the defendant to keep the highways along which it put its poles and wires substantially in the same condition as to convenience and safety as they were in before it constructed its lines along the streets.

Negligence has been said to be a failure of duty. Proof that there was a "live" wire (carrying a deadly current) down in the highway surely raised a presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant, and was its property and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete *prima facie* case of negligence was made out, and the burden was cast upon the defendant to show that this "live" wire was in the street through no fault of its servants and agents.

In *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 821, where a plaintiff sought to recover damages for the burning of his property, fire having been communicated to it by sparks from an engine on the defendant's road, Chief Justice Smith, discussing "the question as to the party upon whom rests the burden of proof of the presence or absence of negligence where only the injury is shown, in case of fire from emitted sparks," declares that this court will "abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpatory circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence"; and he adds that "the servants of the company

must know and be able to explain the transaction, while the complaining party may not; and <sup>200</sup> it is but just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default, show it and escape responsibility.'" This is affirmed in *Moore v. Parker*, 91 N. C. 275, where it is said that a *prima facie* case of negligence being thus made out against the defendant, he must produce proof of care on his part, or of some extraordinary accident that rendered care useless, in order to rebut the presumption.

Guided by the principle announced in these cases, we come to the conclusion that this plaintiff should have been allowed to say to this defendant: "The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it and escape responsibility."

Numerous authorities might be cited to sustain our conclusion upon this point, the cases being strictly analogous to this one. But we content ourselves with a reference to Ray on Negligence of Imposed Duties, 145; Wood's Railroad Law, 1079; Witaker's Smith on Negligence, 423. The last-mentioned author says (p. 422): "If the accident is connected with the defendant, the question whether the phrase '*res ipsa loquitur*' applies or not becomes a simple question of common sense." It seems to us that there is nothing in the relation of the deceased to the defendant or in any of the circumstances attending the incident of his death to prevent the rigid application here of the rule announced by Judge Gaston in *Ellis v. Portsmouth etc. R. R. Co.*, 2 Ired. 138, and reaffirmed, as stated above, in *Aycock v. Raleigh etc. R. R. Co.*, 89 N. C. 321.

Thus far, in the consideration of this matter, we have left out of view the contention of the defendant that the plaintiff's own evidence disclosed the fact that his intestate was guilty of contributory negligence, or at any rate that the facts so established, taken in connection with other facts <sup>200</sup> which defendant's witnesses testified to, if found by the jury, convicted him of contributory negligence; and we have also kept out of view the contention of the plaintiff that there was no evidence of contributory negligence on the part of the deceased. His honor was asked so to tell the jury, and he refused so to instruct them.

In this state by statute the burden of showing contributory negligence in this action is thrown on the defendant. What is

negligence is a question of law to be declared by the court: *Lang v. E. & W. R. R. Co.*, 109 N. C. 559, and cases cited. It was incumbent on the defendant, therefore, to show facts either admitted or proved by the plaintiff, or testified to by the jury, and found by the jury, from which the court would draw the legal inference that the deceased was negligent, and direct the jury to render a verdict declaratory of this legal inference, they having first determined that all the disputed facts pertaining to this part of the controversy were established by a preponderance of the testimony.

After a careful examination of all the evidence adduced on the trial, and after a full consideration of the argument of the able counsel for the defendant, we are clearly of the opinion that there was no evidence of contributory negligence, and his death should so have told the jury.

A child is held to such care and prudence as is usual among children of his age and capacity: *Murray v. Richmond and R. R. Co.*, 93 N. C. 92. The defendant contends that the deceased was ten years of age, "a very healthy, intelligent, moral, and industrious boy." Let us assume this to be true. As he returned to his home the morning of his death, passing along the streets of the city, he was trespassing on no one's property. He was walking where he had a right to walk — not by mere permission or invitation, but because he as one of the public had an absolute right so to do. <sup>210</sup> The wire was on the sidewalk. Only one witness saw him when "he took hold of the wire, and the wire threw him in the ditch." That witness testified that "he did not have to reach for it; he just reached out his hand and took it; he did not have to stoop." No witness testified that there was any thing from which even an adult could have inferred that this wire was carrying a deadly current of electricity, or indeed any current at all. True, the witness who saw him grasp the wire, when he came to his rescue, saw the fiery indications of the passing of the current from the wire to his hand, and several witnesses deposed that after the accident and the throwing of the wire into a yard where there was wet grass, they noted that the wire was "steaming" at the point where one of its coils touched the sidewalk, and also at its extremity in the yard. Grant this to be true, and yet there is not, as it seems to us, any evidence that it was "steaming" when the deceased caught the wire, or if it was, that its "steaming" was such as to carry to a boy passing along a warning that he must not

touch it. We should be very loth to declare an adult guilty of negligence for grasping a wire such as this one under circumstances such as the defendant contends surrounded the deceased. We certainly cannot declare that this boy, whose conduct must be judged with due regard for his boyish nature and habits, negligently caused his own death. The instruction that "upon the evidence the plaintiff's intestate was not guilty of contributory negligence" should have been given.

It follows from what has been said, that as the case was presented at the trial, his honor should have told the jury to answer the second issue No, and should have told them to answer the first issue Yes, if they believed the plaintiff's evidence, unless the *prima facie* case of negligence made out against the defendant was rebutted. It is said in *Moore* <sup>211</sup> v. *Parker*, 91 N. C. 275, that proof of care on the part of the defendant, or of some extraordinary accident which renders care useless, is required to rebut the presumption. Inasmuch as there must be a new trial for the error above stated, it may be well to declare what degree of care is required of the defendant.

It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. "As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents": Ray on Negligence of Imposed Duties, 53.

All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can

easily place wires and poles so that they will not break and fall, unless subjected to some strain that could not be anticipated, and it can as readily prevent the possibility under ordinary circumstances of the contact of wires that should not be allowed to touch one <sup>212</sup> another. There was error in allowing the defendant to prove that there was published in one of the city newspapers "a general statement" by an electric street railway company to the effect that its current was not a deadly one—was not fatal to human life. That fact could not excuse the defendant. If it acted upon such a statement, and without further inquiry or examination conducted itself in the insulation of the wires as if the statement was true, that was to be negligent, for in such an affair to be mistaken and in error is to be careless. The fact that such a publication was made was irrelevant to the issues in the cause. What has been said seems sufficient to guide the next trial of the case.

New trial.

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**ELECTRIC CORPORATIONS.—DUTY TO KEEP THEIR WIRES IN SAFE CONDITION, AND LIABILITY FOR A FAILURE SO TO DO:** See *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692; 32 Am. St. Rep. 348; *Electric Ry. Co. v. Shelton*, 89 Tenn. 423; 24 Am. St. Rep. 614, and the note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 822.

**NEGLIGENCE—DEGREE OF CARE EXPECTED OF CHILDREN.**—The measure of the responsibility of a child for negligence is his capacity to see and appreciate danger, and in the absence of clear evidence of a lack of it, he will be held to such measure of discretion as is usual in those of his age and experience: *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633; *Illinois Cent. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242; *Smith v. O'Connor*, 48 Pa. St. 218; 86 Am. Dec. 582; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; 98 Am. Dec. 66, and note; *Twist v. Winona etc. R. R. Co.*, 38 Minn. 164; 12 Am. St. Rep. 626, and note. But see *Western etc. R. R. Co. v. Young*, 81 Ga. 397, 12 Am. St. Rep. 320, where it was held that neither the average child of its own age nor the prudent man is a standard by which to measure the diligence of a child, but such care as the capacity of the particular child enables it to use, naturally and reasonably, is what the law requires: To the same effect, see *Gulf etc. Ry. Co. v. McWhirter*, 77 Tex. 256; 19 Am. St. Rep. 755.

## DAVIS v. WHITAKER.

[114 NORTH CAROLINA, 279.]

**REGISTRATION OF A DEED IS COMPLETE WHEN IT HAS BEEN FILED** with the register for such registration.

**REGISTRATION OF DEEDS.—THE FAILURE OF THE RECORDER OF DEEDS TO INDEX** a conveyance left with him for registration, and which is otherwise duly registered, does not impair the legal effect of the registration

*R. O. Burton*, for the plaintiffs.

*J. M. Mullen*, for the defendants.

**279** SHEPHERD, C. J. The only question presented for our consideration is whether the deed to Spier Whitaker, trustee, was properly registered, so as to give it priority over the deed executed to Dobie & Co. on the 28th of January, 1890. The deed to Whitaker was duly admitted to probate on the 15th of January, 1883, and ordered to be registered with the certificate of the clerk of the superior court, and on the same day, together with the fee for its registration, it was delivered by the clerk to the register of deeds, who made thereon the following indorsement: "Received and recorded January 15, 1883, in book 69, at page 395." The deed was duly registered on that day, but the register of deeds failed to index the same either **280** in the book in which it is registered or in the cross-index provided by section 3664 of the code.

It is laid down in 1 Jones on Mortgages, section 553, that "The general policy of the recording acts is to make the filing of a deed, duly executed and acknowledged, with the proper officer, constructive notice from that time; and although it be provided that the register shall make an index for the purpose of affording a correct and easy reference to the books of record in his office, the index is designed not for the protection of the party recording his conveyance, but for the convenience of those searching the records; and instead of being a part of the record it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed as well as recorded in order to make it a valid notice."

That the filing the deed with the register had the effect of registration has always been understood to be the law in this state, and such very clearly has been the construction put by this court on the act of 1829, which now constitutes section 3654 of the code: *McKinnon v. McLean*, 2 Dev. & B. 79; *Metts v. Bright*, 4 Dev. & B. 173; 32 Am. Dec. 683; *Parker v. Scott*, 64 N. C. 118. In the case last named the court said: "The deed in trust was delivered to the register for registra-

time at 10 o'clock A. M. on the twentieth day of December, 1865, and was actually registered on the twentieth day of January, 1867, as appears from the certificate of the register. In contemplation of law the deed in trust was duly registered from the time of its delivery to the register, and from that time was good against creditors." The case of *Moore v. Ragland*, 74 N. C. 343, is not in conflict with this well-established doctrine, as it appears that the mortgage was left with the register with directions "not to register the same until he should be thereafter required by the plaintiff to do so." In contemplation of law the mortgage had not been delivered to the register for registration.

<sup>281</sup> In some of the states such effect is not given to the filing for registration, but even in those states, with but one exception, it is held, says Judge Freeman, "that a deed properly filed and copied into the record is recorded within the meaning of the registration laws, and imparts notice to subsequent purchasers, notwithstanding the failure of the recorder to properly index it, and that the index is no part of the record." See note to *Green v. Garrington*, 91 Am. Dec. 109, in which many cases are cited sustaining the views of the annotator.

In consideration of the decisions of this court, agreeing as they do with the preponderance of authority in other jurisdictions, we do not feel justified in departing from the doctrine that the filing for registration is in itself constructive notice; and, if this be so, it must follow that the failure of the register to index a deed, which has actually been registered, cannot impair its efficacy.

It is true that in *Dewey v. Sugg*, 109 N. C. 328, it was held to be essential to a judgment lien that it should be properly indexed, but the decision turned upon the construction of the statute, and the indexing was considered to be an essential element to the creation of that particular kind of lien. A judgment must be actually docketed by a compliance with all the statutory requirements before it becomes a lien, whereas, as we have seen, a registration is valid upon the mere filing for registration.

In the absence of more explicit legislation we cannot hold that the statute directing the indexing of deeds, etc. (Code, sec. 3664), has the effect of repealing the existing law as declared by this court.

Affirmed.



**DEEDS—REGISTRATION OF, WHEN COMPLETE.**—The duty of a party required to file a paper is complete when he has placed it in the hands of the proper custodian at the proper time and in the proper place: *Hook v. Fenner*, 18 Col. 283; 36 Am. St. Rep. 277, and note; *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288, and extended note. Under a statute providing that every deed entitled to be recorded shall be recorded as of the time when it was delivered to the clerk for that purpose, and shall be considered recorded from the time of such delivery, it is conclusive notice to all subsequent purchasers and mortgagees, whether actually recorded or not: *Deming v. Miles*, 35 Neb. 739; 37 Am. St. Rep. 464, and note.

**DEEDS—REGISTRATION—NECESSITY FOR INDEXING.**—In order that a deed may constitute constructive notice it must be duly and properly recorded and indexed, the index being an essential part of the record: *Ritchie v. Griffiths*, 1 Wash. 429; 22 Am. St. Rep. 155, and note; *Hiles v. Atlee*, 80 Wis. 219; 27 Am. St. Rep. 32, and note. See, also, the extended note to *Green v. Garrington*, 91 Am. Dec. 109.

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## FIRST NATIONAL BANK v. DAVIS.

[114 NORTH CAROLINA, 242.]

**BANKS AND BANKING.—THE RELATION BETWEEN A BANK TRANSMITTING PAPER FOR COLLECTION AND THE BANK RECEIVING AND COLLECTING SUCH PAPER** and mingling its proceeds with its other funds is that of debtor and creditor merely, and the creditor bank has no lien upon or for moneys collected, and no preference over the other creditors of the receiving bank.

**ACTION** by the First National Bank of Richmond against Davis, receiver of the Bank of New Hanover, and Leach, receiver of a branch of the same bank, doing business at Wadesboro. The Bank of New Hanover was in the habit of receiving from plaintiff checks and other evidences of indebtedness for collection, charging for its services as collecting agent and remitting daily the proceeds of its collections. By letters bearing various dates from May 21, 1893 to June 14th of the same year, the collections in question had been forwarded. On June 19th the Bank of New Hanover made an assignment, and receivers were appointed. Its cashier had no knowledge of its insolvency until it had actually failed. Neither bank kept any regular deposit account for or with the other. At the time of its suspension the insolvent bank had received from plaintiff for collection twelve thousand two hundred and eighty-six dollars and ninety-two cents, for which it had received in payment forty-six dollars and eleven cents in cash and the balance in checks on itself and on another bank. The moneys and checks received and collected were not kept separate, but were mingled together in

one general fund with the other moneys and property of the insolvent bank. The object of the present action was to obtain a preference in favor of the plaintiff for the amount of the collections made and not paid over.

*Thomas W. Strange and Iredell Meares, for the plaintiff.*

*George Davis and George Rountree, for the defendants.*

**245** BURWELL, J. After a careful examination of the numerous authorities cited by the counsel representing the parties to this cause we have come to the conclusion, upon the facts found, that the relation of the Bank of New Hanover to the plaintiff bank, at the time of the appointment of the defendant receiver, was merely that of debtor to creditor as to the sum of money which is in controversy in this suit. The two banks must be presumed to have entered into the contract between them with the expectation and implied agreement that, in the transaction of the business provided for by that contract, each would act according to well-known and established rules and customs in such business: *Planters' etc. Bank v. First Nat. Bank*, 75 N. C. 534; *Marine Bank v. Fulton Bank*, 2 Wall. 252.

Now, it is a well-known and established custom of banks, when acting as collecting agents either for other banks or indeed for any customer, to put all collections made by **246** them into the general fund of the bank, unless directed to make of them a special deposit, and use them from hour to hour and from day to day in the transaction of their current business, and, when the day or the hour arrives for making remittances, to send to the bank or other customer for whom the collection was made, not the identical currency or money collected, but money or currency taken from the general fund without any reference to its identity, or, as is far oftener done, its cashier's check on itself or some other bank, or in some way to effect a transfer of the fund by the use of credits of one kind or another, without the handling and shipping of any actual money or currency at all. Speaking of such an agreement Justice Miller said, in *Marine Bank v. Fulton Bank*, 2 Wall. 252, that "the truth undoubtedly is that both parties understood that when the money was collected the plaintiff was to have credit with the defendant for the amount of the collection, and that the defendant would use the money in its business. Thus the defendant was guilty of no wrong in using the money, because it became its own. It was used by

the bank in the same manner that it used the money deposited with it that day by city customers, and the relation between the two banks was the same as that between the Chicago Bank and its city depositors." And he adds that "it would be a waste of argument to attempt to prove that this was a debtor and creditor relation." This is cited with approval in *Commercial Bank v. Armstrong*, 148 U. S. 50, where Mr. Justice Brewer said: "Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity during the intervals between the days of remitting were to be made special deposits, but, on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank and be used by it as other funds, and <sup>347</sup> that when the day for remitting came the remittance should be made out of such general funds." And in that case it was decided that, as to all money actually collected by the Fidelity Bank and put into its general fund under authority implied from the customs of banks, the relation of that bank to the bank for whom it was acting as collecting agent was simply that of a debtor to a creditor.

It is true that in the cases cited above the contracts provided that the collecting bank should remit, not daily or on the day of collection, but at stated periods. But we do not think that difference in the terms of the contracts can make the principles fixed by those high authorities inapplicable here. The test is, Did the plaintiff bank agree expressly or impliedly that the proceeds of drafts, checks, etc., sent by it to its collecting agent, the Bank of New Hanover, should not be held by the latter as a special deposit, but merely mingled with the other funds coming in and used in the daily intricate payments and collections of its usual business? Such an understanding or agreement does not appear to us at all inconsistent with the expressed stipulation that remittances should be made each day. This stipulation only required that that should be done each day which, under the contracts under consideration in the cases cited above, was to be done—not daily, but at longer intervals. The important point is not, as we have said, when or how often the remittances were to be made, but whether it was understood that the collecting bank could and would transact the business as it did, treating the checks, drafts, etc., sent it as its own in its daily transactions, keeping memoranda or book entries to show how much

was due to the plaintiff and to other banks for whom it was doing like services, and then, at a convenient hour and in some convenient way, transferring to the plaintiff bank the money due to it. The manner of keeping the account was immaterial—a mere <sup>340</sup> matter of book-keeping. If, under the contract, it was not wrongful for the Bank of Hanover to use money coming to it from the collection of plaintiff's drafts, checks, etc., as its own and remit other money or other checks and drafts to the plaintiff therefor, then it must be that there was no breach of trust or unlawful conversion in the conduct of the officers of the Bank of New Hanover in the conduct of this business for plaintiff. It seems to us plain that both banks must have clearly understood that the relation of principal and agent, as to any particular check or draft sent for collection, ceased just as soon as cash or its equivalent was received by the collecting bank, and that immediately there was substituted for that relation, as to that cash, the relation of debtor and creditor. To announce a contrary conclusion would be to declare that the officers of hundreds of the banks of the country were daily unlawfully and wrongfully converting :: the use of their institutions the property of their correspondent banks.

If the cashier of the Bank of New Hanover had become aware before its failure that the bank was insolvent that knowledge would perhaps have had the effect to annul his right, implied from the terms of the contract and the established customs of such business, to use the collected funds as the plaintiff as he did. It is found as a fact that he had no knowledge; therefore the expressed contract between the parties, with its necessary implication as to the disposition to be made of the plaintiff's money as soon as any of it was collected, remained in force till the failure. Here there was no unlawful conversion of the funds of the plaintiff bank, and there is no necessity for the discussion of the important question presented in the brief of the learned counsel for plaintiff in regard to following funds that have been improperly used by a faithless trustee or agent.

The plaintiff has no lien upon or right to the cash or <sup>340</sup> other assets that came to the hands of the receiver that is superior to the claims of other banks whose relations to the insolvent bank were similar to the plaintiff's, or to the claims of its depositors. All these, unless some special circumstances

confer special rights, must stand as mere creditors and share equally in the funds to be distributed.

The judgment is affirmed.

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**BANKS—RELATION BETWEEN BANK TRANSMITTING PAPER FOR COLLECTION AND BANK RECEIVING SAME.**—The title to commercial paper received for collection by a bank and forwarded to its correspondent in the usual course of business, without any express agreement in reference thereto, does not vest in such correspondent, even if it has remitted upon the general account in anticipation of collections: *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612, and note. See the extended notes to *First Nat. Bank v. Strauss*, 14 Am. St. Rep. 583, and *Allen v. Merchants' Bank*, 34 Am. Dec. 316.

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## **BOTTOMS v. SEABOARD AND ROANOKE R. R. Co.**

[114 NORTH CAROLINA, 699.]

**NEGLIGENCE, WHO MAY RECOVER FOR.**—To maintain an action for negligence the plaintiff must show the existence of a duty to him on the part of the defendant.

**NEGLIGENCE, CONTRIBUTORY OF INFANT.**—An infant only twenty-two months old is incapable of contributory negligence.

**NEGLIGENCE, CONTRIBUTORY OF PARENT.**—The contributory negligence of a parent cannot relieve from liability to an infant, itself of too tender years to be chargeable with negligence, a person through whose negligence such infant has been injured.

**RAILWAY CORPORATIONS, CHILD ON TRACK, DUTY TO.**—If a child is on the track of a railway of such an age that it cannot comprehend the danger, and the defendants' servants in charge of the train, by the exercise of reasonable care and prudence, could have discovered the child in time to stop the train it was their duty to do so; or, if they, in the exercise of ordinary care and prudence, could have discovered that the child was going towards the track or running along very near it so as to render it probable that it would go on the track, and such discovery could have been made in time to stop the train, it was their duty to stop. If, on the other hand, the child came on the track suddenly and unexpectedly, so near that it could not be discovered in time to stop the train in the exercise of ordinary care, or if the engineer and fireman were, by necessary attendance on their duties, prevented from seeing the child until too late to stop the engine in the exercise of ordinary care in time to avoid harm to the child, then there is no negligent act nor liability for resulting injury.

**ACTION to recover for injuries suffered by plaintiff, an infant, from being struck by the defendant's train.** The court submitted to the jury four issues, to wit: "1. Was the plaintiff injured by the negligence of defendant? 2. Did plaintiff's own negligence contribute to his injury? 3. Notwithstanding the contributory negligence of plaintiff, could defendant have

avoided the injury by the exercise of ordinary care and prudence? 4. What damage is plaintiff entitled to recover? The evidence on the part of the plaintiff tended to show that he was struck by defendant's train at about 11 o'clock in the forenoon; that there was no ringing of the bell or blowing of the whistle, and that the engineer by looking out could have seen the child for a distance of five hundred yards before it was struck; that the child was at the time of receiving the injury twenty-two months of age, and was upon the track; and the train was running at good speed. The court upon the first issue charged the jury as follows: "If the defendant, by the exercise of reasonable care and prudence, could have discovered the child on the track in time to have stopped the train it was its duty to have done so; or, if defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of twenty-two months, or very small, was going towards the track or running along very near it, so as to render probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was the defendant's duty to stop, and the defendant would be guilty of negligence in failing to stop. The engineer has a right to suppose that an adult will leave the track and continue his speed, but when a child, without discretion or intelligence, is seen, or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be discovered in time to stop the train in the exercise of ordinary care, then there is no negligence; or, if it came on the track when the engineer and fireman were engaged in their necessary duties in the cab, and they were so engaged long enough to prevent them from observing the child, then there was no negligence. The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper outlook on the track, and for objects so near it as to make their presence a probable obstruction or interruption. If the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child or came so near it that the engine could not be stopped in the exercise of ordinary care, the defendant would not be guilty of negligence." The court further charged the jury that if they believed the evidence they should answer the second issue in the affirmative. The court also charged the jury

as to the third issue as follows: "But the contributory negligence of plaintiff does not necessarily justify or excuse the defendant. If, notwithstanding this negligence of the plaintiff, the defendant could have avoided inflicting the injury by the exercise of ordinary care, the defendant would still be responsible, and the jury should answer the third issue, 'Yes.' If the defendant, by the exercise of reasonable or ordinary care and prudence, could have discovered the child on the track in time to have stopped the train it was its duty to have done so; or, if defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of twenty-two months, or very small, was going toward the track or running along very near it, so as to render it probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was the defendant's duty to stop. The engineer has a right to suppose that an adult will leave the track and continue his speed, but when a child, without discretion or intelligence, is seen, or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be seen in time to stop the train in the exercise of ordinary care, then you will answer the third issue, 'No.' The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper lookout on the track, and for objects so near it as to make their presence a probable obstruction or interference, and if the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child, or so near the child that the engineer could not have stopped the train by the exercise of ordinary care, you will answer the third issue, 'No.' The failure to blow the whistle was not of itself negligence, because the injury did not result from it, but the failure to blow, if it occurred, is evidence on the general question as to whether the defendant was in the exercise of ordinary care."

*E. C. Smith*, for the plaintiff.

*W. H. Day*, for the defendant.

706 *SHEPHERD, C. J.* It is unquestionably true, as argued by counsel, that in order to maintain an action for negligence the plaintiff must not only show the existence of a duty on



the part of the defendant, but he must also show that the duty is due to him: *Emry v. Roanoke Nav. etc. Co.*, 111 N. C. 94. It has been decided by this court that it is the duty of an engineer in running a railroad train to exercise ordinary care by keeping a lookout on the track in order to discover and avoid any obstructions that may be encountered thereon. This duty is due to passengers; and, as a general rule, the duty is likewise due to the owner of cattle running at large; to the owner of other property which, under certain circumstances, may be on the track; and also, as a general rule, to persons who may be on the same at places other than crossings. It has also been decided in many cases, and may be regarded as perfectly well settled, that the failure to exercise such ordinary care in discovering <sup>707</sup> persons or property in time to avoid a collision cannot, except in the case of cattle running at large, be made the subject of a recovery where the plaintiff's negligence is the proximate cause of the injury.

In the present case the jury have found, under proper instructions of the court, that the plaintiff was injured by reason of the negligence of defendant. The plaintiff is, therefore, entitled to recover unless he was guilty of negligence as above stated. The real questions presented therefore are whether the plaintiff was of sufficient age and discretion to be capable of contributory negligence, and, if not so capable, whether the negligence of the parent can be imputed to him?

It is admitted by the pleadings that the plaintiff was at the time of the accident "an infant of tender years" who had been permitted by its mother "to stray and wander" on the track of the defendant. From the language of the admission we would, if it were necessary for the purposes of this decision, be well warranted in holding that *prima facie* the plaintiff was of such a tender age as to be incapable of negligence. Apart from this, however, it is established by uncontradicted testimony, and also admitted by counsel for the defendant, that the plaintiff, at the time of the accident, was, in fact, but twenty-two months old. In several of the states it has been held that an infant of that age is, as a matter of law, incapable of contributory negligence (2 Thompson on Negligence, 1181); while in others it is held, in analogy to the rule of the common law as to criminal responsibility, that an infant under the age of seven years is also incapable, but that the presumption may be rebutted by testimony and that the

question may be determined by the jury: 1 Shearman and Redfield on Negligence, 73, n.

Applying either rule to the present case it is clear that the plaintiff was incapable of contributory negligence, and <sup>708</sup> it must follow that unless the negligence of his mother can be imputed to him there is nothing to bar his recovery.

Conceding only for the purposes of this discussion that the mother was guilty of contributory negligence in going to the well and leaving her infant child in the house without closing the door, and also conceding, what is intimated in *Manly v. Wilmington etc. R. R. Co.*, 74 N. C. 655, and indeed is well sustained by the authorities, that if it be contributory negligence it would defeat an action brought by the parent, we are not prepared to accept the doctrine which obtains in some few jurisdictions that such negligence can be so imputed to the child as to defeat an action when brought in its own behalf.

As the question has never been passed upon in this state it may not be inappropriate to quote at length from some of the leading authorities upon the subject. The imputation of the negligence of parents and guardians to children of tender age is, says Shearman and Redfield on Negligence, page 74, an invention of the supreme court of New York in the leading case of *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273, and has been followed in many of the decisions of that state, although it is said by these authors to be founded upon a *dictum* which has only been assumed to be the law by the court of last resort, but never squarely presented to that tribunal for decision. And they further remark that it may well be doubted whether the question has ever been fully argued any where, and that the result of their examination of the cases is to satisfy them "that the last of the long series of so-called decisions on this point is like the first, a mere *dictum* uttered without hearing argument and without consideration."

Some of the decisions approving the doctrine are based upon the ground that the parent must, in law, be deemed the agent of the child, while others put it upon the ground <sup>709</sup> that the child is identified with its parent or guardian, "a legal fiction which led to the famous and now exploded decision of *Thoroughgood v. Bryan*, 8 C. B. 116," recently overruled by the English appellate court in "*The Bernia*": L. R. 12 Pro. Div. 58; 1 Shearman and Redfield on Negligence,

secs. 66-75. In reviewing the case of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, Mr. Beach says that the doctrine as applied to children too young to exercise discretion is an anomaly and in striking contrast with the case of a donkey which is carelessly exposed in the highway and negligently run down and injured, and also with the case of oysters carelessly placed in the bed of a river and injured by the negligent operation of a vessel, in both of which cases actions have been maintained. And he forcibly observes that, under the principle referred to, "the child, were he an ass or an oyster, would secure a protection which is denied him as a human being of tender years." This author, in his examination of the doctrine, remarks as follows: "It is not true that an infant is not *sui juris*. In the sense of being entitled to maintain an action for his own benefit he is *sui juris*. As far as his right of action is concerned he is in no respect the chattel of his father. . . . The judgment (when suing by guardian or next friend), if any is recovered, is the property of the minor; it is recovered to his sole use. It is an entirely false assumption in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, that the parent or guardian may recover heavy verdicts for their own misconduct. Again, it is assumed in that opinion that an infant, injured by the joint negligence of his parent and a third person, can have legal redress against the parent. 'It is much more fit,' say the court, 'that he should look for redress to that guardian.' If this be so—if the right of the infant be so distinct from the duty of the parent that the relation of parent and child is not an objection to the maintenance of such a suit, then the whole theory upon which this class of cases rests falls to the ground. Again, it is falsely assumed that the parent is the agent of the child. . . . The relation of child and parent is not the relation of principal and agent, neither is it analogous to it. The child does not appoint his father; he has no control over his acts; he cannot remove him from power and appoint another in his stead; he has no right of action against him; every element of agency is wanting. The want of any one of these elements is sufficient to prevent the acts or omissions of the parent from being received as the acts or omissions of the child upon any analogy drawn from the law of agency. By the common law a child cannot appoint an agent. The authority by which the parent exercises control over the child is therefore an authority derived from the law. It is a principle of law laid

known before 'the spacious days of great Elizabeth' that the abuse of an authority derived from the law shall not work harm to or prejudice the rights of the person subjected to it. The parent's authority is given for the protection of the child, but the principle of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, turns the shield into a sword and uses it to deprive the child of the very protection arising from the parental relation": Beach on Con. Neg. 42.

In Wood on Railroads, sec. 322, it is said: "The doctrine announced in this case (*Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273) has been followed in some jurisdictions, but the modern tendency is to reject it, and to hold the negligent injurer liable for the consequences of his own wrongful act, regardless of the contributory negligence of the child's parent or guardian."

Bishop, in his work on Noncontract Law, 582, emphatically rejects the doctrine, and observes that it is "as flatly in conflict with the established system of the common law as any thing possible to be suggested." And an examination of the leading text-books which treat of negligence <sup>711</sup> will disclose that it is also disapproved as being contrary to principle and reason as well as the rapidly accumulating weight of authority: Wharton on Negligence, 312-314; Pollock on Torts, 299; Cooley on Torts, 681; 2 Thompson on Negligence, 1184; Shearman and L. P. Redfield on Negligence, secs. 66-75; Beach on Negligence, 42.

In Tennessee the doctrine is denounced as being opposed "to every principle of reason and justice": *Whirley v. Whitman*, 1 Head. 610. And in Pennsylvania it is declared to be "repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil": *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; 3 Am. Rep. 628.

In *Newman v. Phillipsburg Horse Car R. R. Co.*, 52 N. J. L. 446, Chief Justice Beasley, after exposing the fallacy of basing the doctrine on the ground of agency, demonstrates its untenableness by conducting us to the rather absurd conclusion of making an infant in its nurse's arms answerable for all the negligence of such nurse while thus employed in its service. "Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglect of the guardian is to be regarded as the neglect of the infant, as was asserted in the New York decision, it would, from logical

necessity, follow that the infant must indemnify those who should be harmed by such neglect."

In Vermont the subject was examined with much care in the leading case of *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, in which the court denied the doctrine of imputed negligence as laid down in *Hartfield's* case, and held that, although a child of tender years may be in the highway through the fault or negligence of his parents, and so improperly there, yet, if he be injured through the negligence of the defendant, he is not precluded from redress. "All," says Judge Redfield in delivering the opinion, "that is required of an infant plaintiff in such a case being that he exercise <sup>712</sup> care and prudence equal to his capacity." This rule is also laid down in *Railroad Co. v. Gladmon*, 15 Wall. 401, which is cited with approval in *Murray v. Richmond etc. R. R. Co.*, 93 N. C. 92.

"The Vermont rule, as it is called," remarks Shearman and Redfield, "commends itself to our judgment, and is abundantly justified by the reasoning of the courts which have adopted it. . . . It should be fully applied to such cases, giving to defendants who suffer from its hardships the same consolation which courts administer to plaintiffs when nonsuited them—that their case is very hard and deserves sympathy, but that the law must not be relaxed to meet hard cases." If, where one or two innocent persons must suffer, the law puts the loss, as it justly does, upon the one who has by some negligence enabled the wrong to be done, surely when there are two guilty persons in the transaction the law should not leave the only innocent one to suffer, as it practically does, by referring him to his parent or guardian for an injury of which a stranger has been the principal cause": Shearman and Redfield on Negligence, secs. 77, 78. "No injustice can be done to the defendant by this limitation of the defense of contributory negligence, since the rule itself is not established primarily for his benefit, and he can never be made liable if he has not been himself in fault": Shearman and Redfield on Negligence, sec. 73. The doctrine of *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, has also been denied in Pennsylvania, Ohio, Connecticut, Missouri, Nebraska, Alabama, Tennessee, Texas, Georgia, Louisiana, Illinois, Iowa, Maryland, Michigan, Mississippi, New Hampshire, Virginia, and perhaps in other states, while some of the courts which have heretofore adopted the rule are subjecting it to so many qualifications in order to escape its harshness and injustice

that but little of its original similitude remains: *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371; 8 Am. St. Rep. 751; *Daley v. Norwich etc. R. R. Co.*, 26 Conn. 591; 68 Am. Dec. 413; *Ferguson v. Columbus etc. Ry. Co.*, 77 Ga. 102; 75 Ga. 637; *Chicago etc. Ry. Co. v. Wilcox*, 83 Ill. App. 450; *Wymore v. Mahaska County*, 78 Iowa, 396; 16 Am. St. Rep. 449; *Westfield v. Levis*, 43 La. Ann. 63; *Railroad Co. v. McDonnell*, 43 Md. 534; *Shippy v. Au Sable*, 85 Mich. 280; *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 587; *Winters v. Kansas City Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; *Huff v. Ames*, 16 Neb. 139; 49 Am. Rep. 716; *Basillon v. Blood*, 64 N. H. 565; *Cleveland etc. R. R. Co. v. Manson*, 30 Ohio St. 451; *Smith v. O'Connor*, 48 Pa. St. 218; 86 Am. Dec. 582; *Galveston etc. Ry. Co. v. Moore*, 59 Tex. 64; 46 Am. Rep. 265; *Norfolk etc. R. R. Co. v. Ormsby*, 27 Gratt. 455. These numerous authorities, which we have thought proper to cite very abundantly sustain the position enunciated by the supreme court of the United States and adopted by this court in *Murray v. Richmond etc. R. R. Co.*, 93 N. C. 92, that in the law of negligence the degree of care and discretion required of an infant of tender years "depends upon his age and knowledge," and they also sustain the position that where the child is too young, as in this case, to exercise any discretion whatever, the negligence of his parent or other custodian in permitting him to escape and place himself in a perilous position will not be imputed to him so as to defeat his action for damages sustained by reason of the negligence of another.

There is nothing in *Murray v. Richmond etc. R. R. Co.*, 93 N. C. 92, which at all conflicts with this view. The plaintiff was nearly eight years of age and of sufficient discretion to understand the danger to which he had exposed himself, and, under the circumstances, the court held that he could not recover. The authorities quoted in the opinion, so far as they have any bearing upon this case, are in support of the view we have taken. Our attention, however, was called to a part of the opinion purporting to be founded upon a paragraph in a former edition of Shearman and Redfield on Negligence, to the effect that while an infant should be held to a degree of care only as is usual among children of his age, yet, "if his own act directly brings the injury upon him while the negligence of the defendant is only such as exposes the child to the possibility of injury," he cannot recover. In the fourth and later edition (sec. 73) of the same work this passage is

reproduced with the following comments: "It was held in some English cases that if a child's own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the child to the possibility of danger, the latter cannot recover damages. But these decisions have been condemned in England and are directly opposed to the current of American cases. The law has been settled to the contrary in America by the famous series of turntable cases, in which railroad companies have been held liable by the federal supreme court, as well as by several state courts of last resort." While the passage is really inapplicable to cases like the present, but only it seems to those in which, like the turntable cases, the child meddles with something which is perfectly harmless if let alone, and he thus "directly" brings the injury upon himself, we have nevertheless thought it best to show that, in the opinion of the learned authors, the proposition stated in the former edition of their valuable work is not sustained by the weight of authority.

Neither is there any thing in *Meredith v. Richmond etc. R. R. Co.*, 108 N. C. 616, cited by counsel, which approves of the principle of imputable negligence. The question was not before us, but what was said *arguendo*, assimilating a child apparently too small to appreciate its danger to persons who are apparently helpless on the track, in respect to the duty of the engineer to use all available means to avert a collision, is really in support rather than in contradiction of the views we have expressed in this opinion.

We commend the charge of his honor upon the first issue as a correct exposition of the duty of railroad companies in moving their trains, and especially the limitations <sup>715</sup> with which it is accompanied. The use of the words "ordinary care," unattended with explanation, would have been obnoxious to the authorities in this state (*Emry v. Raleigh etc. R. R. Co.*, 109 N. C. 589), but as it is apparent from the instructions that they were used to indicate a vigilant look-out and also the exercise of all efforts within the power of the engineer to stop the train, we do not see how they could have prejudiced the defendant. Indeed, no objection to the charge in this particular was made on the argument, and this we suppose for the reasons we have given.

Under these instructions it has been found that the defendant has been guilty of negligence, and as we are of the opinion upon the admitted facts that the plaintiff was inca-



pable of contributory negligence, the judgment of the court below must be sustained, and it therefore becomes unnecessary to consider the learned argument of defendant's counsel upon the subject of contributory negligence in its relation to what is commonly known as the rule of *Davies v. Mann*, 10 Mees. & W. 545.

**Affirmed.**

**CLARK, J., concurring.** I concur in the conclusion reached, but dissent from some of the reasons given. The judge charged the jury, I think, correctly, that "if the defendant, by the exercise of reasonable care and prudence, could have discovered the child on the track in time to have stopped the train, it was its duty to have done so; or if the defendant, in the exercise of reasonable or ordinary care and prudence, could have discovered that a child of the age of twenty-two months, or very small, was going towards the track, or running along very near it, so as to render it probable that it would go on the track, and discovery could have been made in time to have stopped the train, it was defendant's duty to stop, and defendant would be guilty of negligence in failing to stop. The engineer has a right to <sup>716</sup> suppose that an adult will leave the track, and continue the speed; but when a child, without discretion or intelligence, is seen, or could have been seen, its presence must be regarded. If the child came on the track suddenly or unexpectedly, so near ahead of the train that it could not be discovered in time to stop the train in the exercise of ordinary care, then there is no negligence; or if it came on the track when the engineer and fireman were engaged in their necessary duties in the cab, and they were engaged long enough to prevent them from observing the child, then there was no negligence. The engineer's first duty to passengers is to keep his engine in proper condition, and also to keep a proper lookout on the track, and for objects so near as to make their presence a probable obstruction or interruption. If the sight of the child was prevented by the necessary attendance by the engineer and fireman to matters inside the cab, and this continued until the time they reached the child, or came so near it that the engine could not be stopped in the exercise of ordinary care, the defendant would not be guilty of negligence," and upon that instruction the jury found against the defendant. While the general underlying principles of the law do not change, their application

in the changing conditions of life and the progress and development of the age must change. Originally, when air-brakes were unknown, and even after they were first introduced, a railroad company would not have been held liable for an injury caused by not stopping within the distance air-brakes would have made possible. The law is otherwise now. So, recently Congress by an enactment has followed some courts and legislatures in making railroad companies liable for a given time for all injuries caused by failure to use automatic couplers on freight as well as on passenger cars. And there are many similar instances of the progress of the law. And in fact, with the progress and development of the times. So, when the speed of railway trains was a fraction of what it is now, and the population sparse, it was not recklessness to fail to keep such a lookout as is now necessary to prevent accidents. But now that the number and speed of railway trains are vastly increased, and the population of the country also, a better lookout is required. A failure to keep a lookout, which, in a given case, the jury find would have prevented an accident, notwithstanding the negligence of the plaintiff in being helpless on the track, is recklessness in a high degree. It has always been held, and by all courts, *serper et oblique*, that though the plaintiff has been negligent, if, notwithstanding that fact, injury by the defendant could have been avoided, but the defendant through recklessness or wantonness committed the injury, the defendant is liable.

There is no disposition in the courts to throw restrictions around railroads in the free use of their tracks. They are becoming more and more important. Over their tracks roll daily the commerce of a people, the transportation of a continent. But with development comes the duty of increased care to avoid injury. Air-brakes, automatic couplers, Miller platforms, electric headlights, heavier rails, and other improvements permit accelerated speed, and the public demands it. But with the increased speed comes the duty of a better lookout. It is recklessness not to have it. The company should be held liable for every injury which could be avoided by a proper lookout, whether as to passengers, children, livestock, or people temporarily disabled and lying on the track. As to whatever it strikes, a railroad engine is as deadly as a cannon-ball. When there is target firing, though due notice is given, if a drunken man wanders across the field of fire

and is lying asleep at the foot of the target, but by proper lookout could be seen, yet <sup>718</sup> for want of it he is struck and killed, I apprehend this would be deemed recklessness. The same holds true as to a drunken man, down and helpless on the track, when by keeping a proper lookout he would be seen, and his death or injury avoided.

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**NEGLIGENCE—WHO MAY RECOVER FOR**—To constitute actionable negligence a duty must exist on the part of the defendant to protect the plaintiff from the injury of which he complains, coupled with a failure to perform that duty, and an injury to the plaintiff arising from such failure: *Faris v. Holerg*, 134 Ind. 269; 39 Am. St. Rep. 261; *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376, and note, with the cases collected.

**NEGLIGENCE, CONTRIBUTORY OF CHILDREN.**—Infants of tender years, and wanting in discretion, are not amenable to the disabling effects of contributory negligence: *Western Ry. v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179, and note.

**NEGLIGENCE, CONTRIBUTORY OF PARENT, WHETHER BARS RECOVERY BY CHILD:** See *Grant v. Fitchburg*, 160 Mass. 16; 39 Am. St. Rep. 449, and note, and *Wiswell v. Doyle*, 160 Mass. 42; 39 Am. St. Rep. 451, and note.

**RAILROADS—DUTY TO CHILDREN ON TRACK.**—A railroad corporation owes, with respect to children of tender years and immature judgment, the duty of keeping a reasonable lookout to discover whether they are on its track, as well as to avoid injury to them after they are seen: *Gunn v. Ohio River R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842, and note. See, also, *Johnson v. Reading etc. Ry.*, 160 Pa. St. 647; 40 Am. St. Rep. 752, and note.

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## STATE v. EASON.

[114 NORTH CAROLINA, 787.]

**WATERS ARE NOT DEEMED NAVIGABLE** in North Carolina, unless they are navigable for seagoing vessels.

**BOUNDARIES UPON NAVIGABLE STREAMS.**—A grant by the state to a riparian proprietor running with a navigable stream extends only to low-water mark.

**BOUNDARIES OF MUNICIPALITY FRONTING UPON NAVIGABLE WATERS.**—If one of the boundaries of a municipal corporation, as designated by statute, is a navigable stream, such boundary does not extend beyond low-water mark.

*The Attorney General and Charles F. Warren, for the state.*

*W. B. Rodman, for the defendant.*

<sup>790</sup> **EVERY, J.** Our numerous long streams and large inland sounds come so clearly within the reason of the rule adopted on account of the different conditions in England, exclusively to waters subject to the ebb and flow of the tides,

THE question presented is, whether here a new test of navigability in determining what submerged land should be reserved as the property of the state, and what should be liable to appropriation by private persons by specific entry and grant or should pass as incident to patents issued to riparian proprietors. The question in North Carolina is whether the stream, if it should be navigable for seagoing vessels: *Broadwater v. State*, 34 N. C. 631; 35 Am. Rep. 633; *Hodges v. Williams*, 15 N. C. 571; 35 Am. Rep. 242; Angell on Watercourses, sec. 241, and note; *Cummins v. Leachery*, 3 Ired. 277; 38 Am. Dec. 722; *Fagan v. Armstrong*, 11 Ired. 433. While the bed of a stream navigable or declared by the legislature to be navigable for "sea vessels" is not subject to entry, the beds of streams that are not large enough to subserve the purpose of a highway for smaller boats, floats, rafts, and logs, but insufficient for seagoing vessels may be granted specifically or pass by deeds of riparian proprietors on both sides, running with rivers and creeks by construction *ad filum aquæ*, but subject to the easement of the public to use the channel as a highway. *State v. Wood*, 137 N. C. 149; *State v. Glen*, 7 Jones, 322; *Thomas v. Buchanan*, 1 Ired. 535; 35 Am. Dec. 760; *McNemar v. Alexander*, 139 N. C. 244. The legislation in North Carolina has been generally in affirmance of the new rule so much better adapted to the nature of this country. Our statutes within the expiration of a short interval, have never permitted the issuing of grants to private individuals for the beds of streams navigable for sea vessels, even though not affected by the deep-water line at most: *Bond v. Wood*, 137 N. C. 149; 1 Potter's Rev. Stats., 278; Rev. Stats. c. 42, sec. 1; Acts of 1777, c. 114; *Hatfield v. Grimstead*, 7 Ired. 169; Code, sec. 2751; Laws 1889, c. 555; Laws 1893, c. 17.

It follows, therefore, that a grant to a riparian proprietor, running with a navigable stream, such as the Pamlico river at Washington, from one designated point on its banks to another above or below on the same bank, must be so located as to extend, not *ad filum aquæ*, but only to the low-water mark along the margin of the stream. This court having uniformly interpreted such calls in grants to individuals as designating the low-water line, we know of no recognized rule of construction that would sustain us in giving a widely different meaning to the same language when used by the legislature to define the limits of a town. Gould, in his work on

Waters, section 202, says, in ascertaining the boundaries of towns: "The same rules of construction apply as in the case of a grant from one individual to another." A municipal corporation can exercise only such powers as are expressly granted by its charter or <sup>792</sup> are necessarily implied in or incident to the powers expressly granted: 1 Dillon on Corporations, sec. 89; *Thomson v. Lee Co.*, 3 Wall. 327; *Thomas v. Richmond*, 12 Wall. 349. "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public": *Minturn v. Larue*, 23 How. 436. A municipality being thus restricted to the exercise of powers clearly intended to be delegated, it would seem that, if the same rigid rule of construction does not obtain in determining the territorial limits to which its authority extends, the location of the geographical limit of its territorial jurisdiction should at all events be determined just as similar calls of grants to individuals are located. "Because the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the incorporation, it is necessary" (says Dillon) "that these limits be definitely fixed": 1 Dillon on Municipal Corporations, sec. 182 (124). But the legislature unquestionably had the power to extend the jurisdiction of the town for police purposes to the middle of the river or to the opposite bank, and had the line been described as crossing the other side when it reached the river, and running thence along that shore to a point opposite the beginning, thence to the beginning, the effect would have been to extend the boundary for the exercise of the power to prohibit nuisance delegated to the town across the adjacent bed of the river, while the territorial limit of its authority for all purposes other than the exercise of police powers would have been the low-water mark on the north bank: *Barber v. Connally*, 113 U. S. 27; *Mugler v. Kansas*, 123 U. S. 628; *Palmer v. Hicks*, 6 Johns. 133; *Ogdenburg v. Lyon*, 7 Lans. 215. We are aware that the authorities in this country are conflicting as to the location of boundaries along inland navigable streams, whether the controversy grows out of fixing the limits of a town or locating the lines of grant.

<sup>793</sup> We find that as a rule, however, the courts in ascertaining the limits of towns have followed their own rulings as to riparian grants. The common-law doctrine was recognized and applied at an early day by the courts of Massachusetts, New Hampshire, Connecticut, Maryland, and Virginia, and later by Ohio, Illinois, Indiana, and some other states: Angell

see *WATERSHEDS*, sec. 547. On the contrary, the common-law rule was recognized by Pennsylvania, North Carolina, South Carolina, Tennessee, Alabama, Michigan, and other states, and a doctrine somewhat similar to the rule of the civil law was substituted for that adopted in England: Angell on *WATERSHEDS*, sec. 543-552; 2 Am. & Eng. Ency. of Law, 515; 15 Am. & Eng. Ency. of Law, 236, et seq.; 249 et seq.

In the comparatively recent case of *Gilchrist's Appeal*, 109 Pa. St. 501, the supreme court of that state held that the limit of a municipality bounded by a navigable river is the low-water mark of that river, unless express language to the contrary is used in the act of incorporation. The question involved was whether the city of Wilkesbarre had the power to levy and collect a tax upon the coal-beds under the bed of the river opposite to that city. The right of the city was denied by the court, and the decision rested upon the ground that a grant to an individual was construed to run with the low-water mark of a navigable stream, and the same rule should be applied in locating the boundaries of towns.

The supreme court of Michigan, in the *City of Coldwater v. Tucker*, 35 Mich. 474, 24 Am. Rep. 601, said: "The general doctrine is clear that a municipal corporation cannot usually exercise its powers beyond its own limits. If it has, in any case, authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public <sup>794</sup> policy have induced the legislature to grant such power": See, also, *People v. Bruchard*, 82 Mich. 158; Gould on Waters, sec. 35. In *Palmer v. Hicks*, 6 Johns. 133, and *Stryker v. Mayor etc. of New York*, 19 Johns. 179, cited for the plaintiff, it appeared that the legislature in both instances had extended the line of a city or town across the bed of a navigable stream to the opposite bank, and the court decided that the statutes extended the jurisdiction of the city for police purposes with the extended line. Any remark from which an inference may be drawn as to the location of a town limit, where the stream is called for, was therefore *obiter*, if indeed such inference is deducible from the language used by the court. The bed of a navigable stream, said the supreme court of New York in *Ogdensburg v. Lyon*, 7 Lans. 215, "is still state, not United States, territory, and the state or its municipalities under its authority may pass laws or ordinances" not in conflict with the constitution of the United States or the laws of Congress

enacted within its constitutional powers. In the case last cited the question was whether the state could empower a city council to pass ordinances to prevent the casting into the adjacent harbor of matter-calculated to obstruct it, where the authority had been delegated to the town by virtue of an express statute conferring it, not as an incident to the usual municipal powers, in the absence of a direct grant expressly or by fair implication, of that particular power. In the section of 1 Horr and Bemis on Municipal Police Ordinances (sec. 142) cited for the prosecution, it seems that the author, after embodying a sentence from *City of Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601, in which the supreme court of Michigan declared that a municipality could extend its police jurisdiction beyond its territorial limits only by virtue of a statute conferring such authority expressly or by necessary implication, proceeds in the same section to state as an inference drawn from the two cases <sup>795</sup> already cited from Johnston's reports the proposition that, where two towns are situated on opposite banks of the same river, and the boundaries of both run with the river, though it is navigable, the dividing line will be the thread of the stream. No such conclusion was fairly deducible from those decisions, because in both instances, as already stated, the whole bed of the stream had been expressly placed by statute under the police jurisdiction of one of the two riparian municipalities. Indeed, after a patient investigation of the whole subject, we have found but a single authority for the position that a grant calling for a navigable stream should be confined to the low-water mark, while a similar line in the boundaries of a municipality should run with the thread of the stream, and the opinion in that case was evidently not well considered, as the point was decided without any discussion whatever.

We think the rule laid down by the court of Pennsylvania and approved by Gould is the correct one—that the same construction which is given to the description of the *locus* conveyed in deeds and grants to individuals must be placed upon similar language when used to define the boundaries of a municipality. We conclude, therefore, that where the state confers municipal powers upon a corporation, and describes its boundary as running with a navigable river, the jurisdiction of the municipality does not extend beyond the low-water mark in the absence of some other language in the charter extending the limit of its jurisdiction expressly or by fair



implication. We can readily conceive how the decayed fish and offal thrown into a river like the Pamlico in front of Washington, where the influence of the tides is felt, may become an almost unendurable nuisance. But further annoyance might have been prevented by a proper amendment of the charter of the town, and may still be obviated by legislation in the <sup>796</sup> future. Meantime, unless the powers of the commissioners of navigation, under section 3587, can be invoked to protect those who suffer from the stench by this offensive matter floating upon the river or lodging on the banks, we deem it more important that the court should be reasonable and consistent in its rulings, so as to inspire confidence in their justice and stability, than that some of its citizens should be relieved without delay of even so sore a grievance.

We think, therefore, that there was no error in the ruling of the court below that, even upon a warrant sufficient in form, the defendant could not be convicted for a violation of the ordinance prohibiting the throwing of fish or offal into the river beyond the limit of its jurisdiction, the low-water line, and the judgment must be affirmed. In view of the peculiar hardship to the people interested of enduring this annoyance we suggest also an investigation of the question whether the facts as to the conduct of this particular defendant or the facts in any other case of creating a stench in the river, which is a public highway, by casting fish or offal into it would sustain an indictment for nuisance at common law: *Commonwealth v. Sweeney*, 131 Mass. 579; *State v. Wolf*, 112 N. C. 889.

Counsel on both sides discussed the question whether the court had the power after verdict to amend the warrant, which before charged that the defendant "did on the twentieth day of September, 1893, in violation of ordinance 11, section —, of the ordinances in force of the said town of Washington, contrary to the statute in such case made and provided, and against the peace and dignity of the state," by inserting specific charge of throwing dead fish into Pamlico river. As the ordinance embraced eight distinct charges that might have been made, seven others besides that set forth in the amendment, we deem it a matter of <sup>797</sup> such importance as to make it proper to say that the question is still an open one, which we refrain from discussing, because it is not essential to the final disposition of this particular case to do so.

Affirmed.

**WATERCOURSES—WHAT ARE NAVIGABLE STREAMS.**—Navigable streams in the United States are of three classes: 1. Tidal streams that are held navigable in law, whether navigable or not; 2. Those that, though nontidal, are yet navigable in fact for boats or lighters, and valuable for commercial purposes; 3. Those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs, or the products of mines, forests, and tillage of the country they traverse to mills and markets: *Guston v. Mace*, 33 W. Va. 14; 25 Am. St. Rep. 848, and note with the cases collected. Navigable waters include not only those in which the tide ebbs and flows, but those which are navigable in fact, and afford a channel for commerce or subserve any other beneficial public use: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541.

**BOUNDARIES ON NAVIGABLE WATERS—HOW FAR RIPARIAN PROPRIETORS TAKE.**—This question is the subject of the monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56.

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## STATE v. AUSTIN.

[114 NORTH CAROLINA, 855.]

**A MUNICIPAL ORDINANCE FORBIDDING ANY MINOR TO ENTER A BAR-ROOM**, unless as the agent or servant of his parent or guardian, is valid if the municipality enacting it had by statute been given power to make such rules and regulations for the better government of the town as its commissioners might deem necessary, not inconsistent with the laws of the land.

*The Attorney General*, for the state.

*Batchelor & Devereux*, and *R. B. Redwine*, for the defendant.

**856 BURWELL, J.** The town of Monroe has power and authority "to make such by-laws, rules, and regulations for the better government of the town" as the commissioners thereof may deem necessary, provided the same are "not inconsistent with the laws of the land": Code, sec. 3799.

This is an express grant of authority to the officers of this municipal corporation to exercise within the territory made, subject to their control, the police power of the state, the only expressed restriction upon their action being that the rules and regulations made by them shall not be inconsistent with "the laws of the land."

Authorities need not be cited to prove that the legislature of the state may transfer to local municipal legislative bodies created by it the duty and responsibility of exercising a portion of its own police power. It seems to be conceded that the legislature has power to declare it unlawful for any minor to enter a bar-room, and thus protect them from the evil

influences that might affect them if exposed to the temptations to which their presence in such resorts might expose them.

This concession is an admission that the ordinance in <sup>887</sup> question is not repugnant in its provisions to either the federal or state constitutions, for those fundamental enactments impose their restraining influence on the legislature not less than on its creatures—the legislative councils of the towns and cities of the commonwealth.

There being, then, no ground for maintaining that the ordinance under consideration is invalid because of its unconstitutionality, and the grant by the legislature to the municipality of the power to exercise its police power in such manner as the commissioners may deem necessary being clear and explicit, it only remains to inquire whether the enactment is consistent with the laws of the state, and is reasonable. In the grant of police power to this municipality the restriction imposed is that its ordinance shall not be inconsistent with "the laws of the land." The expression "the laws of the land" can only refer to the laws of this state—the statutes and common law—by the enforcement of which peace and good order are maintained throughout this state, and by which the conduct of all its citizens, whether they dwell in the cities and towns or not, is controlled. It is not permitted to these local legislative bodies in this state to exercise that portion of the police power intrusted to them upon subjects about which the legislature has seen fit to enact laws (*Washington v. Hammond*, 76 N. C. 33; *State v. Brittain*, 89 N. C. 574), nor to adopt ordinances that tend to obstruct the general policy of the state in the exercise of its police power as evinced by its statutes. In the treatise of Horr and Bemis on Municipal Police Ordinances, section 88, it is said: "According to the American theory of municipal existence the legislation permitted to be exercised by municipal corporations is a mere delegation of the power of the state, and the ordinances created by virtue of this delegated authority are as much a part of the general scheme of legislation as are <sup>888</sup> the laws of the state. It is, therefore, necessary that they should be consistent with the laws of the state. . . . Municipalities have no power to repeal, directly or indirectly, the laws of the state, and their legislation must accord with the policy of the legislation of the state. If the only measure of authority were the terms of the charter there would often be

ordinances plainly within the granted power, but irreconcilable with some state law or contrary to the settled policy of the state, a result neither lawful nor intended. Some charters, by express language, restrict the ordinances that may be passed to such as are consistent with the laws of the state. Others are silent upon the subject, but the restriction exists whether expressed or not, and becomes very important in its application."

We can discern no inconsistency between the provisions of the ordinance under consideration and any particular law of the state or the general policy of its legislation. Indeed, we find in it rather a commendable effort on the part of this local legislative body to supplement what the state by its general legislation has done to protect the young of the commonwealth. The state declares that one who deals in intoxicating liquors shall neither sell nor give to an unmarried minor any such liquors: Code, sec. 1077. This ordinance declares that such minor shall not enter the bar-rooms that are subject to the control of the town. It helps and does not hinder the policy of the state upon this subject. All its tendencies are towards the prevention of the infraction of the law of the state and the preservation of peace and good order. Its rigid enforcement must be desired by the proprietors of saloons, for only danger and trouble can come to them from allowing such persons to frequent their places of business: *State v. Kittelle*, 110 N. C. 560; 28 Am. St. Rep. 698. It interferes with none of the saloon-keeper's rights, and is, indeed, contrived in part for his protection. <sup>859</sup> It prevents minors from exposure to temptation in places where they should not go. The law which forbids any dealer in intoxicating liquors to give or sell to a minor such liquors is valid. Its validity could scarcely be assailed with any show of reason: Black on Intoxicating Liquors, sec. 42. This ordinance rests upon the same foundation as that law—the right of the state, either by direct general legislation or through its municipal "home rule" agencies, to shield youth from temptation. It has been held (says the author quoted above) that a law against permitting a minor to enter upon and remain in a retail liquor dealer's place of business is valid, and the state has power to enact and enforce such a law even in disregard of the parent's wishes when its object and tendency are to protect the child: *Goldsticker v. Ford*, 62 Tex. 385.

What has been said above seems a sufficient refutation of

the assertion that the ordinance is unreasonable, oppressive, and discriminating. It seems to us a wise and wholesome restraint upon the youth of the community, made in their interest as well as that of the law-abiding keepers of the bar-rooms. It is not oppressive.

The police of our cities and towns—officers charged with the duty of preventing offenses as well as of arresting offenders—should have the power and authority to prevent youths from entering saloons. They can derive such authority only from such ordinances. It is not unlawfully discriminating. It applies to all unmarried minors, and is no more obnoxious to this objection than is the section of the code mentioned above, and other laws which are made to protect and control the youth of the land. While it is true that all grants of power to municipal corporations should be strictly construed, and that all doubts should be resolved against the authority of the corporation, it is also ~~also~~ true that where, as in this case, the grant of power is plain and unequivocal, courts will not interfere with, control, or nullify the acts of the officers of the municipality except for most cogent reasons. The contrary course would bring about an unseemly intermeddling of the judicial department of the government with the established agencies of the legislative department—the legislative councils of towns and cities—and such intermeddling could but have the effect of hampering the action of those bodies and retarding the development of such communities.

If fraud, dishonesty, or oppression is charged against them, courts will be swift to investigate the charge and to correct the evil if found to exist. But other matters, involving mere questions of expediency and judgment, must be decided in another way. We adopt, as applicable here, the language used by Judge Daniel in *Hellen v. Noe*, 3 Ired. 493: "If a majority of the citizens of the town deem the ordinance impolitic or injurious to the people of the corporation they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is against the general law or is, in itself, unreasonable."

No error.

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AVERY, judge, dissented from the foregoing opinion, and contended that under the permission to make laws conferred upon the municipality was not included the power of enacting laws in derogation of common right; that before an ordinance contravening common right could be upheld, the power to enact must be plainly conferred by a valid and competent legislative

grant; that the authority conferred by statute on the commissioners of the town to make "such by-laws, rules, and regulations for the better government of said town as they may deem necessary, provided the same be not inconsistent with the laws of the land," did not include the power to exclude an infant from a bar-room, because, under the laws of the land he had the right of locomotion in common with other persons; that the power given to the municipality to preserve health or abate nuisances did not include in it the authority to pass the ordinance in question. He concluded as follows: "I think, for the reasons which I have stated, that neither under the provision of the charter commonly known as the general welfare clause, nor under the power to protect health and prevent nuisances, can the governing authorities of a municipality enact a valid ordinance purporting to prohibit a boy of twenty years of age from entering where business is conducted presumably under the sanction of the law. The legislature may put the sale of intoxicants under ban of the law so completely that a place where it is illicitly sold shall be deemed a nuisance, but while such business houses are licensed by law, town commissioners cannot brand them, without authority, as places unfit for boys who frequent other stores and saloons.

"It was contended on the argument of the case, and not without authority and reason, that had the legislature, instead of the municipality, enacted a law prohibiting minors from frequenting the business houses mentioned in the ordinance in question the statute would have been unconstitutional and void. Without passing upon that question or even conceding for the sake of the argument that the legislature has the power to prevent a minor from being employed in, or even entering, a place where intoxicants are sold, it would be none the less essential, in order to give validity to a similar law passed by a municipality, to show the delegation to the corporation of the authority claimed either expressly or by fair implication.

"The authorities cited, therefore (Black on Municipal Legislation, sec. 42, and numerous cases from the courts of other states), in support of the legislative authority to pass statutes of the same purport, have no necessary bearing upon the case in the absence of any attempt to delegate the power which the town attempted to exercise.

"I think that the judge below erred in instructing the jury upon the special verdict to find the defendant guilty, and a new trial ought to be awarded."

**INTOXICATING LIQUORS—SALES TO MINORS BY DIRECTION OF PARENTS.** This subject is discussed in the note to *Snider v. State*, 12 Am. St. Rep. 354. It is no defense for the sale of liquor to a minor without the written consent of his parent or guardian that the father was present and orally consented to the sale: *Blahut v. State*, 54 Ark. 538. The sale of liquor to a minor as agent for an adult, for whom, and with whose money he procures it, and to whom he takes it, and of which facts the dealer is cognizant when the liquor is gotten, does not constitute a sale to the minor: *Monaghan v. State*, 66 Miss. 513. See, also, the note to *State v. Kittelle*, 28 Am. St. Rep. 707.

## STATE v. HALL.

[114 NORTH CAROLINA, 909.]

**CONFLICT OF LAWS.**—ONE STATE OR SOVEREIGNTY CANNOT ENFORCE THE PENAL OR CRIMINAL LAWS OF ANOTHER, nor punish offenses committed in or against another state or sovereignty.

**CRIMINAL LAW**—STATE WHERE CRIME IS DEEMED COMMITTED.—If a shot is fired in one state at a person in another, resulting in his death, the crime thereby committed is deemed to have been committed in the state where the shot takes effect, and not in the one where it was fired. Therefore, the courts of the latter state have no jurisdiction to try and punish the party, though he is one of its citizens.

*The Attorney General, for the state.*

*G. S. Ferguson, for the defendants.*

¶11 SHEPHERD, C. J. There was testimony tending to show that the deceased was wounded and died in the state of Tennessee, and that the fatal wounds were inflicted by the prisoners by shooting at the deceased while they were standing within the boundaries of the state of North Carolina. The prisoners have been convicted of murder, and the question presented is whether they committed that offense within the jurisdiction of this state.

It is a general principle of universal acceptation that one state or sovereignty cannot enforce the penal or criminal laws of another, or punish crimes or offenses committed in and against another state or sovereignty: Rorer's Interstate Law, 308; Story's Conflict of Laws, 620-623; *The Antelope*, 10 Wheat. 66-123; *State v. Knight*, Tayl. ¶12 65; *State v. Brown*, 1 Hayw. (N. C.) 100; 1 Am. Dec. 548; *State v. Cutshall*, 110 N. C. 538.

There may, by reason of "a statute or the nature of a particular case," be apparent exceptions to the rule, as if "one personally out of the country puts in motion a force which takes effect in it, he is answerable where the evil is done, though his presence was elsewhere. So where a man, standing beyond the outer line of a territory, by discharging a ball over the line kills another within it; or himself, being abroad, circulates libel here, or in like manner obtains here goods by false pretenses; or does any other crime in our own locality against our laws, he is punishable, though absent, the same as if he were present": 1 Bishop's Criminal Law, 109, 110; *State v. Cutshall*, 110 N. C. 538.

These cases, however, are but instances of crimes which



are considered by the law to have been committed within our territory, and in nowise conflict with the general principle to which we have referred. Starting, then, with this fundamental principle, and avoiding a general discussion of the subject of extraterritorial crime, we will at once proceed to an examination of the interesting question which has been submitted for our determination.

It seems to have been a matter of doubt in ancient times whether, if a blow were struck in one county and death ensued in another, the offender could be prosecuted in either, though according to Lord Hale (Hale's Pleas of the Crown, 426) "the more common opinion was that he might be indicted where the stroke was given." This difficulty, as stated by Mr. Starkie, was sought to be avoided by the legal device "of carrying the dead body back into the county where the blow was struck, and the jury might there," he adds, "inquire both of the stroke and death": 1 Starkie's Criminal Pleading, 2d ed., 304; 1 Hawk's Pleas of the Crown, c. 13; 1 East, 361. But to remove all doubt in respect to a matter of <sup>913</sup> such grave importance, it was enacted by the statute 2 and 3 Edward VI. that the murderer might be tried in the county where the death occurred. This statute, either as a part of the common law or by re-enactment, is in force in many of the states of the union, and as applicable to counties within the same state its validity has never been questioned (see Acts 1891, c. 68, and also Tennessee Code, sec. 5801), but where its provisions have been extended so as to affect the jurisdiction of the different states its constitutionality has been vigorously assailed. Such legislation, however, has been very generally, if not indeed uniformly, sustained: *Simpson v. State*, 4 Humph. 461; *Green v. State*, 66 Ala. 40; 41 Am. Rep. 744; *Commonwealth v. Macloon*, 101 Mass. 1; 100 Am. Dec. 89; *Tyler v. People*, 8 Mich. 326; *Hemmaker v. State*, 12 Mo. 453; 51 Am. Dec. 172; *People v. Burke*, 11 Wend. 129; *Hunter v. State*, 40 N. J. L. 495.

Statutes of this character "are founded upon the general power of the legislature, except so far as restrained by the constitution of the commonwealth of the United States, to declare any willful or negligent act, which causes an injury to person or property within its territory, to be a crime": Kerr on Homicide, 47. See, also, remarks of Justice Bradley in the *habeas corpus* proceedings of Guiteau, reported in the notes to the case of *United States v. Guiteau*, 1 Mackey, 498,

47 Am. Rep. 247. In many of the states there are also statutes substantially providing that where the death occurs outside of one state, by reason of a stroke given in another, the latter state may have jurisdiction: See our act, Code, sec. 1197. The validity of these statutes seems to be undisputed, and indeed it has been held in many jurisdictions that such legislation is but in affirmance of the common law. This view is taken by the supreme court of the district of Columbia in *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247, in which the authorities are collected and their principle <sup>914</sup> stated with much force by Justice James. It is manifest that statutes of this nature are only applicable to cases where the stroke and the death occur in different jurisdictions, and it is equally clear that where the stroke and the death occur in the same state the offense of murder at common law is there complete, and the courts of that state can alone try the offender for that specific common-law crime.

The turning point, therefore, in this case is whether the stroke was, in legal contemplation, given in Tennessee, the alleged place of death; and upon this question the authorities all seem to point in one direction.

In the early case of *Rex v. Coombs*, 1 Leach C. C. 388, it was held that "if a loaded pistol be fired from the land at a distance of one hundred yards from the sea, and a man is maliciously killed in the water one hundred yards from the shore, the offender shall be tried by the admiralty jurisdiction; for the offense is committed where the death happened, and not at the place whence the cause of the death proceeds": See, also, 1 East, 367, and 1 Chitty's Criminal Law, 154.

In the case of *United States v. Davis*, 2 Sum. 482, a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles, and a foreign government, by which a person, on board a schooner belonging to the natives and lying in the same harbor, was killed. Mr. Justice Story, in the course of his opinion, said: "What we found ourselves upon in this case is that the offense, if any, was committed on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course under the territorial government of the Society Islands, with which kingdom we have trade and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognize as <sup>915</sup> entitled to the rights and sovereignty of an independent nation, and of course entitled to try offenses committed

within its territorial jurisdiction. I say the offense was committed on board of the schooner; for, although the gun was fired from the ship *Rose*, the shot took effect and the death happened on board of the schooner, and the act was, in contemplation of law, done where the shot took effect. . . . We lay no stress on the fact that the deceased was a foreigner. Our judgment would be the same if he had been an American citizen."

In *Simpson v. State* (Ga., May 29, 1893), 17 S. E. Rep. 984, it was held by the supreme court of Georgia that one who, in the state of South Carolina, aims and fires a pistol at another who at the time is in the state of Georgia, is guilty of the offense of "shooting at another," although the ball did not take effect, but struck the water in the latter state. The court said: "Of course the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual; it may be constructive. The well-established theory of the law is, that where one puts in force an agency for the commission of crime, he in legal contemplation accompanies the same to the point where it becomes effectual. . . . So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this state the mere fact of missing would not render the person who shot any the less guilty; consequently, if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle."

The court approved of the language of Campbell, J., in *916 Tyler v. People*, 8 Mich. 320, that "a wounding must of course be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots with a gun, and he may very reasonably be held present where his forcible act becomes directly operative."

In speaking of crime committed by one out of the state, through an innocent agent, Judge Rorer says: "In such case the innocent person in the state is the means used to perpetrate the crime therein, just as if a person who shoots out of a state across the line into another state and therein intentionally kills another person is in such case guilty of com-

mitting the criminal act within the state without himself being at the time therein": Rorer's Interstate Law, 326.

In *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89, Justice Gray says that, if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction."

In *State v. Carter*, 27 N. J. L. 499, the supreme court of New Jersey, in discussing a kindred question, said: "This is not the case where a man stands on the New York side of the line, and, shooting across the border, kills one in New Jersey. When that is so the blow is in fact struck in New Jersey. It is the defendant's act in this state. The passage of the ball, after it crosses the boundary, and its actual striking, is the continuous act of the defendant. In all cases the criminal act is the impinging of the weapon, whatever it may be, on the person of the party injured, and that must necessarily be where the impingement happens. And whether the sword, the ball, or any other missile passes over a boundary in the act of striking is a matter of no <sup>917</sup> consequence. The act is where it strikes as much where the party who strikes stands out of the state as where he stands in it.

In *State v. Chapin*, 17 Ark. 560, 65 Am. Dec. 452, the court said: "For example, if a man standing beyond our boundary line in Texas were, by firing a gun or propelling any other implement of death, to kill a person in Arkansas he would be guilty of murder here, and answerable to our laws, because the crime is regarded as being committed where the shot or other implement propelled takes effect": See, also, *People v. Adams*, 3 Denio, 207.

In *Stillman v. White Rock Mfg. Co.*, 3 Wood. & M. 538, Woodbury, J., said: "I can conceive of crimes likewise, like civil injuries, which may be prosecuted in two states, though sometimes in different forms, as here. . . . So, if one fires a gun in one state, which kills an individual in another state, there may be the offense of using a deadly weapon in the first state (that is, we suppose, by statute), and committing murder by killing in the second state."

In speaking of the validity of acts similar to that of 2 and 3 Edward VI., Mr. Black, in an article in the *Central Law Journal* (vol. 38, p. 318), remarks: "There is less

difficulty in cases where the means of death employed, though set in motion in one jurisdiction, reach and operate upon their object in another territory; for, of course, the act can amount to nothing more than an attempt until the fatal agency comes in contact with the body of the victim": See, also, upon this subject, 20 Am. Law Rev. 918.

In view of the foregoing authorities it cannot be doubted that the place of the assault or stroke in the present case was in Tennessee, and it is also clear that the offense of murder at common law was committed within the jurisdiction of that state. If this be so, it must follow that unless we have some statute expressly conferring jurisdiction upon <sup>§18</sup> the courts of this state, or making the act of shooting under the circumstances a substantive murder, the offense with which the prisoners are charged can only be tried by the tribunals of Tennessee.

It is true that in Wharton's Criminal Law, 288, it is said in a general way that "a concurrent jurisdiction exists in the place of starting the offense"; but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are uttered in one state to take effect in another (*United States v. Worrall*, 2 Dall. 384); or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (*Green v. State*, 60 Ala. 40; 41 Am. Rep. 744); or where an accessory before the fact in one state to a felony committed in another was held to be indictable in the state where he became accessory (*State v. Chapin*, 17 Ark. 560; 65 Am. Dec. 452); or in certain cases of false pretenses; or in conspiracies, where an overt act is committed at the place of the trial; or where, by statute, a particular "section" of an offense committed in one jurisdiction is there made indictable; as, for instance, the act of shooting or unlawfully using a deadly weapon within the state, as in the present case. In some instances there may be concurrent jurisdiction of the whole offense, and in others there may exist the jurisdiction of an attempt in one state and of the consummated offense in another. In a note to the preceding section the author thus explains: "The place of such residence (that is, where the offense is started) has jurisdiction over the attempt or conspiracy, as the case may be. The place of the consummation has jurisdiction of the offense consummated on its soil." In respect to this very

matter the learned author has made his meaning entirely clear in his article on the conflict of laws: 1 Crim. Law Mag. 695. In putting the case of A in New York <sup>919</sup> shooting B in Connecticut, he says that the place of the consummation of the crime should be regarded as its locality. "Until such consummation a crime, so far as jurisdiction is concerned, is simply an attempt, and only punishable as such. It may be indictable for A merely to discharge a gun. It may be said: 'This is a dangerous act, punishable as such'; or it may be said: 'From all the circumstances of the case we infer that you are attempting B's life, and you are to be indicted for this attempt.' But it is not until we see before us a man wounded by such a shot that the crime, in its completeness, exhibits itself."

There being, then, no concurrent jurisdiction at common law, we will now consider whether it has been conferred by statute; for it is well settled that "whenever a homicide is committed partly in and partly out of the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or state in which the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction": Kerr on Homicide, 226; *Commonwealth v. Macloon*, 101 Mass. 1; 100 Am. Dec. 89. It is not very seriously insisted on the part of the state that our statute (Code, sec. 1197) applies to this case, but inasmuch as it was referred to on the argument, it is proper that we should briefly examine into its provisions. It provides: "In all cases of felonious homicide, when the assault shall have been made within this state, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all intents and purposes, as if the person assaulted had died within the limits of this state."

This statute has received a judicial construction by this court in *State v. Dunkley*, 3 Ired. 116, and it was held that <sup>920</sup> it did not create any new offense, but merely removed a difficulty which existed as to the place of the trial. In view of the authorities cited it can hardly be contended that the assault in the present case was committed in this state, and especially is this so when the assault mentioned in the statute evidently means not a mere attempt, but such an injury inflicted in this state which results in death in another state.

This would seem manifest from the history of the legislation as well as the language of the act, which plainly contemplates that every part of the offense, except the death, must have occurred in this state. It was a subject of doubt, as we have seen, whether the accused could be tried in the place of the stroke, the death having occurred without the jurisdiction, and it was to remove this doubt alone that this and similar legislation was resorted to. It was, of course, never questioned that the place where both the stroke and the death occurred was the place where the crime was committed. We are relieved, however, from all doubt, if any existed, upon this point, by the opinion of Chief Justice Ruffin in *State v. Dunkley*, 3 Ired. 116. He says that the act "does not profess to define 'felonious homicide,' or to constitute the crime by any particular acts, but merely says that in certain cases of felonious homicide the offender may be indicted, and of course tried and punished in the county where the stroke was given, meaning, though it does not (like the statute 2 and 3 Edward VI.) expressly say so, 'in the same manner as if the death had happened in the same county where the stroke was given.'" As it is plain that in contemplation of law the stroke was given in Tennessee, we are of the opinion that there was error in refusing to give the instructions prayed for by the prisoners.

The fact that the prisoners and the deceased were citizens of the state of North Carolina cannot affect the conclusion <sup>921</sup> we have reached. If, as we have seen, the offense was committed in Tennessee, the personal jurisdiction generally claimed by nations over their subjects who have committed offenses abroad or on the high seas cannot be asserted by this state. Such jurisdiction does not exist as between the states of the union under their peculiar relation to each other (Rorer's Interstate Law, 308), and even if it could be rightfully claimed it could not in a case like the present be enforced in the absence of a statute providing that the offense should be tried in North Carolina. Even in England, where it seems the broadest claim to such jurisdiction is asserted, a statute (33 Henry VIII.) appears to have been necessary in order that the courts of that country could try a murder committed in Lisbon by one British subject upon another: *Rex v. Sawyer*, Russ. & R. C. C. 294, cited and commented upon in *State v. Dunkley*, 3 Ired. 116. In *People v. Merrill*, 2 Park. C. C. 600, it is said that, by the common law, offenses were



local, and the jurisdiction in such cases depends upon statutory provisions: See, also, Wheaton on International Law, 115; 1 Wharton's Criminal Law, 271; 1 Bishop's Criminal Law, 121. Granting, however, that in some instances the jurisdiction may exist without statute, it is not exercised in all cases. Dr. Wharton says: "It has already been stated that as to crimes committed by subjects in foreign civilized states, with the single exception in England of homicides, the Anglo-American practice is to take cognizance only of offenses directed against the sovereignty of the prosecuting state, perjury before consuls and forgery of government documents being included in this head." To the same effect is 3 American and English Encyclopedia of Law, 539, in which it is said: "As to offenses committed in foreign civilized lands, the country of arrest has jurisdiction only of offenses distinctively against its sovereignty": See, also, Dr. Wharton's article upon the subject in 1 Criminal Law Magazine, 922 715. As between the states the question is so clear to us that we forbear a general discussion of the subject. We may further remark that, while it is true that the criminal laws of a state can have no extraterritorial force, we are of the opinion that it is competent for the legislature to determine what acts within the limits of the state shall be deemed criminal, and to provide for their punishment. Certainly there could be no complaint where all the parties concerned in the homicide are citizens of North Carolina. It may also be observed that in addition to its common law jurisdiction the state of Tennessee has provided by statute for the trial of an offender under the circumstances of this case.

For the reasons given we are constrained to say that the prisoners are entitled to a new trial.

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CONFLICT OF LAWS—EXTRATERRITORIAL EFFECT OF PENAL STATUTES.—The criminal laws of a state have no force beyond its territorial limits: *Ex parte McNeeley*, 36 W. Va. 84; 32 Am. St. Rep. 831, and note. See, also, the extended note to *Attrill v. Huntington*, 14 Am. St. Rep., 350.

CRIMINAL LAW—JURISDICTION.—PLACE WHERE CRIME COMMITTED: See *Ex parte McNeeley*, 36 W. Va. 84; 32 Am. St. Rep. 831, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OREGON.**

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**ALDRICH v. ANCHOR COAL AND DEVELOPMENT CO.**

[24 OREGON, 32.]

**CORPORATIONS.—PROCESS AGAINST A CORPORATION MUST BE SERVED** upon its principal officer within the jurisdiction of the sovereignty by whose laws it exists, and authority for serving it in any other manner must be conferred by the statute of the state where the process is served.

**CORPORATION.—PROCESS MAY BE SERVED ON A FOREIGN CORPORATION** in this state if it is doing business here and the action arises out of such business.

**CORPORATION—JURISDICTION OVER FOREIGN.—Service of process on an officer of a foreign corporation who is casually in this state does not, in the absence of a statute conferring authority to make such service, give the courts of this state jurisdiction over such corporation when it has neither an agency nor property in this state, and has not done business therein other than entering into a contract to be performed in another state.**

**CORPORATION—PERSONAL LIABILITY OF STOCKHOLDERS—ENFORCING IN ANOTHER STATE.—If the statutes of a state in which a corporation is organized create a liability against its stockholders for their proportion of its debts this liability may be enforced by an action against them, or any of them, in any other state in which jurisdiction over them can be obtained. Nor does the fact that in the state in which the action is brought the liability of a stockholder in a domestic corporation can be enforced only by a suit in equity require the creditor of the foreign corporation to resort to a like suit, nor exclude him from his remedy by an action at law.**

**ACTION** against the Anchor Coal & Development Company and B. E. Loomis, one of its stockholders, to recover upon a contract for work and labor performed for the corporation in the state of Washington. The complaint, in addition to stating the cause of action against the corporation, averred that it was organized under the laws of the state of California;

that the defendant Loomis was one of its stockholders, and that, by the statute of California, "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each; and in such action the court must ascertain the proportion of the claim or debt for which defendant is liable, and a several judgment must be rendered against each in conformity therewith." Loomis was vice-president and general manager of the corporation, and, being temporarily within the state, the summons was served upon him personally. He demurred to the complaint on the ground that the court had no jurisdiction, and that it did not state a cause of action against him. The corporation appeared specially, moving to set aside the service of process on the ground that such service was unauthorized. The motion of the corporation was granted, the demurrer of the defendant Loomis was sustained, and the action dismissed. The plaintiffs appealed.

*Milton W. Smith and Walter S. Perry, for the appellants.*

*Edward B. Watson, James F. Watson, and Ben B. Beckman, for the respondents.*

<sup>24</sup> BEAN, J. 1. The first question for our consideration is whether the service upon the general manager of the defendant corporation in the state of Oregon gave the court jurisdiction of the corporation. It appears from the affidavits in support of and against the motion to vacate the service that the defendant, being a corporation organized and existing under the laws of California, with its principal office in the city of Oakland in that state, transacted no corporate business, had no property within this state, and had no agency for the transaction of any portion of its business therein, but that at the time its general manager was served he was temporarily within the state for the purpose of negotiating a sale of the stock and plant of the defendant company in the state of Washington to residents of Oregon, and that the contract under which the work was done by plaintiffs in Washington was made and entered into within this state. The

claim is therefore made that under these facts the service upon Loomis <sup>35</sup> could not bind the defendant corporation, or give the courts of this state jurisdiction of it. By the common law, process against a corporation must be served upon its head or principal officer within the jurisdiction of the sovereignty by whose laws it exists, and any authority for proceeding against it in any other manner must be conferred by statute of the state where process is served: *Moulin v. Trenton etc. Ins. Co.*, 24 N. J. L. 222; *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5. The inconvenience and often manifest injustice of exempting a corporation from being sued in a state other than that in which it was created has caused the rule in modern times to be very much relaxed, and it is now generally held that where a corporation created in one jurisdiction is permitted, either by express enactment or by acquiescence, to do business in another, it is to be deemed a resident, and subject to the jurisdiction of the courts of the latter in all matters founded upon contracts made or causes of action arising there, and service may be made upon it in the same manner as a domestic corporation where the law does not provide otherwise: 2 Morawetz on Corporations, 980; *Miller v. Eastern Or. Min. Co.*, 45 Fed. Rep. 345; *St. Clair v. Cox*, 106 U. S. 350. But where a foreign corporation is not engaged in business in the state, and has neither an agency nor property therein, there is no way of reaching it with process, and service upon an officer or agent of the corporation residing in another jurisdiction, and only casually in the state, will not, in the absence of a statute authorizing such service, confer jurisdiction, it being deemed that his official character does not accompany him beyond the jurisdiction in which the corporation was created: *Moulin v. Trenton etc. Ins. Co.*, 24 N. J. L. 234; *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5; *Peckham v. Haverhill Parish*, 16 Pick. 286; *Newell v. Great Western Ry. Co.*, 19 Mich. 345; *Latimer v. Union Pac. Ry. Co.*, 43 Mo. 105; 97 Am. Dec. 378; *State v. District Court of* <sup>36</sup> *Ramsey County*, 26 Minn. 234; *Midland etc. Ry. Co. v. McDermid*, 91 Ill. 170; *Phillips v. Burlington Library Co.*, 141 Pa. St. 462; 23 Am. St. Rep. 304; *Clews v. Woodstock Iron Co.*, 44 Fed. Rep. 31.

2. This state permits foreign corporations to transact business within her limits, and, either by express enactment—as in case of certain corporations—or by her acquiescence, they are as free to engage in legitimate business as corporations of her own creation. There is no statute expressly pro-

viding for service of process upon them, except in the case of certain named corporations, not material to be noted in this connection; but it is expressly provided by section 516 of Hill's Code that "no corporation is subject to the jurisdiction of a court of this state unless it appear in the court, or have been created by or under the laws of this state, or have an agency established therein for the transaction of some portion of its business, or have property therein; and in the last case only to the extent of such property at the time the jurisdiction attached." From the provisions of this section it seems clear that when service is made within the state upon the agent of a foreign corporation it is essential, in order to give the court jurisdiction to render a personal judgment, that it should appear somewhere in the record that the corporation has an agent in the state, conducting some portion of the business for which it was organized. It proceeds upon the theory that when a foreign corporation, availing itself of the rule of comity, carries on its business, or any portion thereof, in this state, it shall be treated and held to be found here; also, to respond to its obligation when called upon to do so in the courts of the state. But it is quite clear that the mere making of a contract in this state with plaintiffs, to be performed in Washington, in the absence of a more definite statement as to the nature and terms of the contract, and the fact that Loomis, at the time of service upon him, was temporarily <sup>27</sup> within the state for the purpose of negotiating a sale of the property of the defendant corporation, was not an invoking of the comity of the state by the corporation for the exercise of its franchise or the transaction of any portion of the business for which it was organized, and did not, under the statute, give the court jurisdiction; and hence there was no error in sustaining the motion to vacate the service upon Loomis: *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. Rep. 635.

3. The remaining question is whether an action at law can be maintained in this state to enforce a stockholder's liability created by the laws of California. By the statute of that state each stockholder in a corporation is made personally and individually liable for such proportion of each debt or claim against the corporation as the amount of his stock bears to the whole subscribed capital stock, and any creditor can maintain a several action against him for such proportion of his claim: Deering's Civ. Code, sec. 322. This statute has repeat-

edly been before the courts of that state for interpretation, and the construction uniformly put upon it has been that the liability of a stockholder for the corporate debts is primary and original, and in no way dependent or contingent upon a recovery against the corporation, and that proceedings in behalf of a creditor to enforce such liability may be had in an ordinary action at law: *Mokelumne Canal etc. Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Morrow v. Superior Court*, 64 Cal. 383; *Borland v. Haven*, 37 Fed. Rep. 394. It will thus be seen that the liability of a stockholder in a California corporation is, by the statute and decisions of that state, a liability in the nature of a contract, the same in legal effect as if he had separately and directly contracted with a creditor to pay such proportion of his claim as the amount of his stock bears to the whole subscribed ~~38~~ capital stock, and is enforceable by an action at law in the same manner, and we cannot see why it may not be so enforced in this state. The statute indeed creates a new right and liability not existing at common law, but does not prescribe a peculiar remedy for its enforcement; it only declares that it may be enforced by action, leaving the creditor to select such common-law remedies as may be in use in the jurisdiction where the suit is brought to enforce such liability. When a statute not only creates a new right and liability against a stockholder, but prescribes a peculiar remedy for its enforcement, such remedy is sometimes held to be exclusive, and often cannot be enforced in another state by the employment of the remedies, and according to the course of procedure, provided by its laws. In such case it would seem the creditor can enforce the stockholder's liability only in the state where the corporation exists: *Cook on Stocks and Stockholders*, sec. 219; *Nimick v. Mingo Iron Works*, 25 W. Va. 184; not, however, because the liability is not recognized as valid and binding, but because the forum where it is sought to be enforced is incapable of administering the peculiar remedy provided for its enforcement. Where a liability, however, is created by statute, without making the procedure for its enforcement, as it were, a part of the liability, we cannot see why it should not be enforced in any court having jurisdiction of the subject matter and parties. There is no difference between a statutory and a common-law right or liability in this regard. The nature of the remedy or the jurisdiction of

the court to enforce it does not in any manner depend on the question whether it is the one or the other. "Whenever," says Mr. Justice Miller, "by either the common law, or the statute law of the state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties": *Dennick v. Railroad Co.*, 103 U. S. 18. And, in general, a creditor of a corporation whose shareholders are by a statute made personally liable in the nature of a contract for its debts may maintain a suit or action to enforce this liability in any court capable of administering the proper relief, whenever he can obtain jurisdiction over the parties, if it is not opposed to the legislation or public policy of the state in which it is sought to be enforced: *Thompson on Liability of Stockholders*, sec. 8; *Flash v. Conn.*, 109 U. S. 371; 16 Fla. 428; 26 Am. Rep. 721; *Altman's Appeal*, 98 Pa. 505; *Ex parte Van Riper*, 20 Wend. 614.

It is insisted, however, by counsel for defendant, that because the rule prevails in this state that the liability of a stockholder to the creditors of a domestic corporation can be enforced only in equity, resort must be had to the same forum to enforce the personal statutory liability of a stockholder in a foreign corporation. We are unable to concur in this view; the liability of a stockholder in this state is upon his obligation to contribute to the capital stock, which is regarded as a trust fund to be held by the corporation for the benefit of its creditors. He is not personally liable to the creditors, except through the corporation, and the creditor is not given, either by the constitution or statute, any remedy against the stockholder, except to require him, in case of the insolvency of the corporation, to contribute for the benefit of the creditors the amount of his unpaid subscription, hence his remedy to enforce this liability is in equity, where the rights of the corporation, the stockholders, and creditors can be adjusted in one suit: *Ladd v. Cartwright*, 7 Or. 329; *Hodge v. Silver Hill Min. Co.*, 9 Or. 200; *Brundage v. Monumental etc. Min. Co.*, 12 Or. 322; *Patterson v. Lynde*, 106 U. S. 519. But the liability sought to be enforced in this action is, by the statutes and decisions of California, a legal liability in the nature of a contract in favor of the creditor and against the stockholder, enforceable <sup>40</sup> in an ordinary action at law, and there is no sufficient reason why it may not be enforced in the courts of



this state the same as any other legal liability arising on contract made in another state.

For the reasons suggested the judgment of the court below will be affirmed as to the defendant corporation and reversed and remanded for further proceedings not inconsistent with this opinion as to defendant Loomis.

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**CORPORATIONS, FOREIGN—SERVICE OF PROCESS ON WHOM MADE.**—Jurisdiction over a foreign corporation cannot be obtained by service of process upon a person who is not its cashier, director, or managing agent: *Taylor v. Granite State etc. Assn.*, 136 N. Y. 343; 32 Am. St. Rep. 749. When a corporation, organized and doing business under the law of one state, contracts a debt through its authorized agent in another state he is so far its managing agent there that service of process upon him for the debt while he is temporarily within the state will bind the corporation: *Klopp v. Creston City etc. Water Works Co.*, 34 Neb. 808; 33 Am. St. Rep. 666; *Reyer v. Odd Fellows' etc. Assn.*, 157 Mass. 367; 34 Am. St. Rep. 288, and note. See the note to *Blinc v. Paymaster Min. Co.*, 29 Am. St. Rep. 157, and the extended note to *Hampson v. Weare*, 66 Am. Dec. 121.

**CORPORATIONS, FOREIGN—WHERE MAY BE SUED.**—A corporation may be sued in a state other than that in which is its principal office when it is also a corporation of the state in which it is sued, and by the law of that state jurisdiction of a domestic corporation is not confined to the county in which its principal office is or chief officer resides: *Baltimore etc. R. R. Co. v. Gallahue*, 12 Gratt. 655; 65 Am. Dec. 254. In Massachusetts a foreign corporation may make contracts, and may sue and be sued thereon: *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note; and the same is true in Illinois: *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581. A railroad incorporated in Maryland, but leasing and operating a railroad in Virginia, is subject to suit in the latter state: *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384. Process may be served on the agents of foreign corporations doing business within the state as well as upon the agents of domestic corporations under the Illinois act of 1853: *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124.

**CORPORATIONS, FOREIGN—PROCESS ON OFFICER CASUALLY IN STATE.**—Service of process upon an officer of a foreign corporation who is temporarily in another state, and who does not voluntarily appear to the action, does not give the courts of that state jurisdiction over the corporation: *Latimer v. Union Pac. Ry. E. D.*, 43 Mo. 105; 97 Am. Dec. 378; *Phillips v. Burlington Library Co.*, 141 Pa. St. 462; 23 Am. St. Rep. 304, and note. It is not necessary, under the Michigan statute, that the officer or agent of a foreign corporation upon whom service of process is made while in the state should be in the state on official business for his corporation, or be specially authorized by it to receive service of process: *Shickle etc. Iron Co. v. S. L. Wiley Construction Co.*, 61 Mich. 226; 1 Am. St. Rep. 571. See, also, the note to *Klopp v. Creston City etc. Water Works Co.*, 34 Neb. 808; 33 Am. St. Rep. 666, and the extended note to *Hampson v. Weare*, 66 Am. Dec. 122.

**CORPORATIONS.—ENFORCING LIABILITY OF STOCKHOLDERS IN FOREIGN JURISDICTION:** See the extended notes to *Fowler v. Lamson*, 37 Am. St. Rep. 169, and *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 868.

## THE VICTORIAN.

[24 OREGON, 121.]

**APPELLATE PROCEDURE, ADVERSE PARTY, WHO IS.**—Every party whose interest in relation to the judgment or decree appealed from is in conflict with the reversal or modification sought by the appeal, is an adverse party, and must be served with a notice of appeal under a statute requiring the appellant to serve such notice on the adverse party. The notice must be served on all persons whose interests are adverse to the party appealing.

**APPELLATE PROCEDURE, ADVERSE PARTIES WHO ARE NOT.**—Persons who are affected by a judgment to the same extent as the appellant, and who would be equally benefited with him by a reversal or modification thereof, are not adverse parties, and therefore he need not serve them with the notice of his appeal. Therefore, if a judgment is against a defendant and his sureties, he may appeal therefrom without serving them with his notice of appeal, or otherwise making them parties to the appellate proceeding.

**SHIPPING AND ADMIRALTY, MARITIME CONTRACTS, WHAT ARE NOT.**—A contract for building a ship or supplying engines, timber, or other material for its construction is not a maritime contract.

**SHIPPING AND ADMIRALTY JURISDICTION.**—PROCEEDINGS *IN REM* IN STATE COURTS against a vessel to enforce a lien given by a state statute for materials furnished in its construction may be maintained without interfering with the jurisdiction vested in the courts of the United States respecting maritime causes of action.

**SHIPPING AND ADMIRALTY—MARITIME CONTRACTS, WHAT ARE NOT.**—The fact that some of the materials used in the construction of a vessel were furnished after it was launched and afloat does not show that the contract under which they were furnished was a maritime contract, nor that a proceeding *in rem* to enforce the lien for such materials cannot be maintained in the state courts.

**STATUTE OF LIMITATIONS—RUNNING ACCOUNT.**—If a statute provides that all actions against a boat or vessel to enforce a lien for materials furnished in its construction shall be commenced within one year after the cause of action accrues, and the materials are furnished under circumstances which indicate a running account during the process of the building of the boat, the transaction is regarded as a single one, and the action may be sustained if commenced within a year after furnishing the last item, though other items were sold and delivered more than a year before the action was brought.

**PRACTICE.**—AN ANSWER IS NOT FRIVOLOUS unless it appears to be so by the bare statement of it, and without argument.

**PRACTICE.**—A MOTION TO STRIKE OUT part of a pleading as irrelevant, should be denied if it states a semblance of a cause of action or of defense. The proper mode of testing the sufficiency of a cause of action or of defense is by demurrer, and not by motion to strike out.

**LIEN OF MATERIALMAN, CONTRACTOR CANNOT AVOID OR WAIVE.**—If a state statute gives a lien against vessels for all debts of persons by virtue of contracts, express or implied, with the owners of such vessels or with the agents, contractors, or subcontractors, of such owner, or any of them, on account of labor done or materials furnished in the

building of such vessel, such lien in favor of a materialman cannot be waived or destroyed by the contractor to whom he furnished the materials, nor by the payment to the contractor of the entire sum to which he was entitled by the terms of his contract for building such vessel.

**ACTION** by Smith Brothers & Co. against the boat *Victorian* to enforce a lien as materialman. Judgment for the plaintiff.

*William W. Cotton and Zera Snow*, for the appellant.

*Earl C. Bronaugh, William D. Fenton, Lewis L. McArthur, and Earl C. Bronaugh, Jr.*, for the respondents.

**126** LORD, C. J. 1. This is an action brought against the defendant boat, *Victorian*, under the provisions of the boat lien law (sec. 3690, et seq.), to enforce a lien for materials alleged to have been furnished by the plaintiffs to one J. F. Steffen, and to have been used by him as a contractor in the construction of the defendant boat. The record discloses that the sheriff of Multnomah county seized the boat, whereupon the Oregon Short Line Railway Company, as defendant and claimant, filed its undertaking as provided by section 3698 of Hill's Code, with D. P. Thompson and J. W. Troupe as sureties, and obtained its release, and thereafter appeared in the action as such defendant and claimant. After trial, the court rendered a judgment against the boat *Victorian*, and, also, under section 3701 of Hill's Code, against the defendant company and its sureties in the undertaking.

**127** From this judgment the defendant company has appealed, but neither D. P. Thompson nor J. W. Troupe has joined in the appeal, nor has it served notice of such appeal upon them, or either of them. Upon this state of the case plaintiffs have moved to dismiss the appeal, upon the ground that Thompson and Troupe are so connected in the judgment, and would be so affected by its modification or reversal, that they are, as to the plaintiffs or defendants, an "adverse party," within the meaning of the statute in relation to appeals, and, therefore, necessary parties to give the appellate court jurisdiction to revise or reverse it. Our code provides that "any party to a judgment or decree . . . may appeal," and that "the party appealing is known as the appellant, and the adverse party as the respondent": Code. sec. 536. "Any party" evidently refers to any person who is a party to the action. To take an appeal it is required

that "the appellant shall cause a notice to be served on the adverse party, and file the original with proof of service indorsed thereon with the clerk": Code, sec. 537. Who, then, is "an adverse party," within the meaning of those provisions of the code, upon whom the notice of appeal must be served? Evidently every party whose interest in relation to the judgment or decree appealed from is in conflict with the modification or reversal sought by the appeal. Such has been declared to be the meaning of the words "adverse party" as used in the statutes of other states: *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Cotes v. Carroll*, 28 How. Pr. 436; *Hiscock v. Phelps*, 2 Lans. 106; *Wheeler v. Hartshorn*, 40 Wis. 96; *Senter v. De Bernal*, 38 Cal. 640; *Lillienthal v. Caravita*, 15 Or. 341.

2. The notice must be served on all parties whose interests are adverse to the party appealing. The question, then, is whether Thompson and Troupe, who have not appealed from the judgment, are to be deemed adverse parties so as to require them to be served with notice of <sup>128</sup> the appeal. They certainly have no interests in the case which are adverse to or in conflict with those of the appellant. The judgment is against them and the appellant, as well as the boat, for a specific sum of money. Its modification or reversal would affect them precisely as it would affect the appellant, indicating that its and their interests are identical, and not adverse. The party interested in sustaining the judgment or decree is an adverse party to the appellant, and, as such, is entitled to notice of the appeal. Thompson and Troupe are not interested in sustaining, but in defeating, the judgment, and are not parties whose interests are in conflict with, or adverse to, the party appealing. "Our code," says Sander-son, J., "allows any and every party who is aggrieved to appeal without joining any one else, no matter what may be the character of the judgment against him, whether joint or several, and in this respect works a change from the former practice; but he is required to notify all other parties who are interested in opposing the relief which he seeks by his appeal, if they have formally appeared in the action in the court below, or his appeal, as to those not served, will prove ineffectual, and also as to those served, if the relief sought is of such a character that it cannot be granted as to the latter without being granted as to the former also": *Senter v. De Bernal*, 38 Cal. 642. Thompson and Troupe are not parties

"who are interested in opposing the relief which the appellant seeks by his appeal," and, therefore, it is not required to notify them. When, of parties who are interested in opposing the relief sought by the appeal, some are, and others are not, served, the appeal will prove ineffectual when the relief sought is of such character that it cannot be granted to those served without being granted as to those not served. As Thompson and Troupe were not interested in sustaining the judgment from which the appeal is brought, they are not "an adverse party" within the meaning of the statute, and consequently are not entitled to notice of appeal.

129 3. The next objection involves the right of the court to enforce the lien by a proceeding *in rem*. It is founded upon the assumption that the lien sought to be enforced arose out of a maritime contract, and constituted, therefore, a maritime cause of action. By the ninth section of the judiciary act of 1789 the district courts of the United States are invested with the exclusive jurisdiction of all maritime causes of action, saving to suitors in all cases the right of the common-law remedy where the common law is competent to give it. The contention is that the common-law remedy thus saved to suitors does not extend to the enforcement of liens by a proceeding *in rem*, and, consequently, that a cause of action arising out of a maritime contract belongs exclusively to the admiralty jurisdiction. The action was brought under section 3690, to enforce a lien on the boat *Victorian*, for materials alleged to have been furnished to and used by the contractor in the construction of such boat. The findings show that the boat was launched before it was completed, and some of such materials were furnished and used after it was launched, but before it was completed. When the action was commenced the boat had not been enrolled or licensed, though application had been made to the proper authorities to have it enrolled and licensed under the name *Victorian*. The lien given under our subdivision 2 of section 3690 is almost identical with that given under section 14 of the Massachusetts statute, and under either statute such lien may be enforced by a proceeding *in rem*. In *Atlantic Works v. The Glide*, 157 Mass. 525, 34 Am. St. Rep. 305, the jurisdiction of the courts of a state to enforce liens by a proceeding *in rem* for labor and materials furnished in repairing domestic vessels was thoroughly examined and upheld. As the court was divided, the case is especially valuable in presenting the

has been launched into the water when a contract relating to her equipment is made in no way fixes or determines its character. In such case the work performed or the material furnished is in constructing the boat or vessel, and to bring her into existence as a complete entity. There is a marked difference between furnishing materials to a vessel already in existence and furnishing them to bring one into existence. The latter are for her construction, and the contract is not maritime. The idea is that the vessel, when completed, will be used for maritime purposes, but until then she is in the process of construction—a structure under state control—and a land contract, though she may be afloat, is not a maritime, but a land, contract. The fact, therefore, that the work was done or the material furnished after the vessel was launched does not per se, as the cases show, render the contract maritime. In *Wilson v. Lawrence*, 82 N. Y. 411, the vessel was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as a part of and to complete the work of construction. The question was whether the furnishing of sails after launching was a land contract or one purely maritime. The court held that it was a land contract, and that the lien attached. Finch, J., said: "It is doubtless true that, before launching, the contracts for construction are more easily and strongly shown to be land contracts, but no case holds that the work of building or constructing a vessel cannot proceed after the launch. It would be wise and hold that, for it is purely a question of fact. A vessel may be launched when she is in the water. . . . In *Black v. Chapman*, 22 How. 129, the court held that 'a contract for building a ship or supplying engines, timber, or other material for her construction is clearly not a maritime contract.' If an engine is an essential part of the construction of a vessel propelled by steam, why are not the sails an essential part of the construction of a sailing vessel? Is the ship without these necessary aids any more built or constructed in the one case than the other? . . . We are satisfied that the contract in this case was a land contract and that the lien attached." In *McDonald v. The Nimbus*, 137 N. W. 2d, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

sea and used as a commercial vessel after her arrival in Gloucester": *Baizley v. The Odorilla*, 121 Pa. St. 233.

In the case of *The Iosco*, Brown's Admr. 495, a hull completed at the place of launching received a small cargo of flour as ballast, was towed with her spars on deck to another port, where her masts were stepped and the vessel put in condition for navigation, and it was held that the work was done in the building of a vessel, and that admiralty had no jurisdiction. Mr. Justice Longyear said: "What libelants did and furnished were clearly by way of completing the construction of the vessel, and constituted <sup>134</sup> in no sense, within the meaning of the maritime law, repairs and materials, for which by that law an action *in rem* will lie. It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is done after she has been put in the water. Neither is there any thing in the position of libelant's advocate that the schooner had to all intents and purposes assumed the position and liabilities of a vessel, by taking in and transporting freight on her trip from Alabaster to Bay City, and that therefore what was done and furnished to and for her at the latter place by libelants must be deemed as repairs, etc. The undisputed testimony is that the flour, etc., were taken as ballast. But even if this were otherwise, the position could not be maintained, because it clearly appears that the vessel was not so far completed at the time as to enable her to discharge the functions for which she was intended, and that the sole purpose of the trip was to avail her owners of the greater facilities of Bay City to complete her construction, and that the taking on of the flour, etc., was a barely incidental matter." In *The Count De Lesseps*, 17 Fed. Rep. 461, the claim was for materials, consisting of a derrick, buckets, and other dredging machinery furnished at Philadelphia after the vessel had been towed from New Jersey where she had been built, to fit out the vessel for an intended voyage to Panama, and it was held that they were furnished in the original construction of the boat: *The Pacific*, 9 Fed. Rep. 124; *Collis v. Goernine*, 7 Am. Law Reg. 5; *Smith v. The Royal George*, 1 Woods, 293; *The Norway*, 3 Ben. 163. These cases show that a claim for work done or materials furnished in the building or original construction of a vessel is not a maritime contract, and that admiralty has no jurisdiction. The claims are not maritime when they are for original construction or equipment, whether



or not the boat has been launched. It is the usual mode in the building of steamers to build the <sup>135</sup> hull, and to place the engines, boilers, and machinery in it after the launching, so as to avoid the additional weight of the machinery in the process of launching. When the work done or the material furnished is used in the construction of the vessel, and to bring her into existence as an entity, the claim does not arise out of a maritime contract, and it is competent for the state courts to enforce it by a proceeding *in rem*.

4. The next objection involves the statute of limitations. Section 3706 provides that "all actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action accrued." The record discloses that the defendant reserved exceptions to all evidence relating to materials furnished and used in the vessel more than a year prior to the commencement of the action. The contention is, as to such items, that the cause of action accrued more than one year prior to its commencement, and therefore, within section 3706, the plaintiff had no lien as to such items, or a cause of action upon them. The facts show that the plaintiff furnished the material from time to time as it was needed for use in the construction of the boat, and that there were several payments made on the account during the interim. The mode of dealing between the parties indicates a running account during the process of the building of the boat. Each item was added to the account at intervals, according as it was ordered and furnished, and the aggregate of items so furnished constitutes the claim, less the credits, for the materials furnished in the construction of the boat. The claim was a running account for materials which passed into the vessel permanently during the progress of its construction. All the items in the account relate to one transaction—the building of the boat—and constitute it a continuous account regardless of intervening balances. In such case it seems to us that the furnishing of the materials should be <sup>136</sup> deemed a continuous account, rather than as independent transactions. It is different when the various transactions are separate and independent, and there are payments of some one or more of them without regard to the others. To sustain the contention of the defendant we must consider each item in the account as a separate and distinct transaction, constituting an independent cause of action, and necessitating its commencement against the boat, in order to save the lien, within one year

after the sale of each item, notwithstanding the items in the account were for materials furnished for the same general purpose, namely, the construction of the boat, and stand related to it as one transaction. Nor do we think there is anything in the *City of Salem*, 31 Fed. Rep. 616, in conflict with this doctrine. The language of Mr. Justice Deady, that "whenever a check or order of the owners was paid, under the statute giving a lien, such payment constituted a cause of action, and unless asserted or enforced within a year the lien is lost," indicates that he regarded such payment as a separate and distinct transaction. The statement of facts is meager, and this inference is more reasonable than the other. This result is decisive of other objections that were raised under section 3706, and eliminates their consideration from the case.

5. The next objection relates to errors assigned in striking out on motion portions of the second amended answer. So far as the motion went to matters already in issue by the denials in the answer there was no error. The grounds of the motion were, that the answer, in the particular specified, was sham, frivolous, and irrelevant. The provisions of the code in reference to such motions are found in sections 75 and 85 of Hill's compilation. Of two separate defenses contained in the answer one is alleged as a defense, and the other as a partial defense, to the cause of action. The first was struck out, as appears from the motion, on the ground that "the matters and <sup>137</sup> things therein alleged are sham, frivolous, irrelevant, and immaterial, and do not constitute a defense or counterclaim to the cause of action"; and the second was struck out for like reasons. The error complained of is that the motion was used to test the sufficiency of these defenses instead of a demurrer. Counsel for the plaintiffs concede that if the defenses named had been separately pleaded, and had been complete in themselves, the better practice would have been to reach the objection by demurrer. It is insisted, however, that if the defenses stricken out in the answer failed to state facts constituting a defense, partial or otherwise, the defendant claimant has sustained no prejudice, and that the proof of them could not make a defense. There can be no doubt that the object of a motion to strike out is not to perform the office of a demurrer. There are many decisions to the effect that an answer may be insufficient in form or substance without being frivolous. To be frivolous it must

appear so incontrovertibly from the mere reading or bare statement of it. If an argument is required to show that the pleading is bad it is not frivolous. Ryan, C. J., said: "When it needs argument to prove that an answer is frivolous it is not frivolous, and should not be stricken out. To warrant this summary mode of disposing of the defense the mere reading of the pleading should be sufficient to disclose, without debate and beyond doubt, that the defense is sham and irrelevant": *Coltrill v. Cramer*, 40 Wis. 555.

6. So, too, it is held that, where there is a semblance of a cause of action or defense set up in the pleading, its sufficiency cannot be determined on motion to strike it out as redundant or irrelevant. In *Waller v. Fowler*, 85 N. Y. 621, it is said: "There is a semblance of a cause of action stated in the answer. Whether it was a valid counterclaim within the code is a question which should be determined either by demurrer or by motion on the trial, and not by a summary motion to strike it out as <sup>138</sup> redundant or irrelevant. The two remedies are not concurrent." And again: "It may very well be that this constitutes in law no defense; but the sufficiency of a defense cannot be determined on a motion to strike out a pleading. To reach such a defect is the appropriate office of a demurrer." It must be conceded, then, that the proper mode to test the sufficiency of a cause of action or defense is by demurrer. Nor is there any doubt but that the rule should be enforced, unless it is manifest that the defense, upon its face, is clearly insufficient in law, and can serve no other purpose than to delay the litigation. We are unwilling to say that the bare inspection of these defenses in the answer warrants us in declaring them to be frivolous; but we are satisfied that they are untenable, and plainly so. The motion has been treated as a demurrer, and so argued to us, and it will only unnecessarily prolong the litigation for us to delay our decision. In view of these considerations we have concluded it is better to treat the motion as a demurrer, and pass upon the defenses with the hope that our decision may not lead to any relaxation of the proper practice in such cases.

7. Our statute (section 3690) provides that "every boat or vessel . . . . constructed in this state . . . . shall be liable and subject to a lien . . . . for all debts due to persons by virtue of a contract, express or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having

them employed to construct . . . . such boat or vessel on account of labor done or materials furnished by mechanics, tradesmen, or others in the building . . . . such boat or vessel." The contract of the owner with the contractor necessarily authorizes the contractor to procure materials to construct the boat. This being so, he was authorized to contract with the plaintiffs to furnish the material necessary to be used in the construction of the boat. The plaintiffs allege that, at the <sup>139</sup> instance of the contractor, they furnished materials which were used in the construction of the boat, and that they thereby acquired a lien thereon for the amount specified. The defendant seeks to defeat the lien by alleging that it was agreed between the company and Steffen, by the contract, that it should pay to him a certain sum therein named for all the work done and materials furnished in the construction of the hull of the steamboat, and that "such amount should be in full of all claims of any kind whatsoever against the hull of the said boat." It is also alleged that payments were made to the contractor as provided in the contract, and that there was nothing due him at the time of the commencement of the action.

It is claimed that the allegation that it was a part of the contract that the payments so made should be in full of all claims of any kind whatsoever is fatal to the lien of the plaintiffs. The statute gives the lien upon furnishing the materials as a means of securing payment therefor. The language is that the "boat shall be liable and subject to a lien" for a debt due the materialman by virtue of a contract, express or implied, with the contractor on account of materials furnished in the building of such boat. The intent of the legislature that the materialman shall have a lien on the boat or vessel is plainly and definitely declared, nor is there any suggestion of implied conditions or limitations to the right of lien as thus given. Hence, as Barclay, J., well said: "We have no right to assume, without more, that the statute thereby meant to say that such a lien should only exist when the owner had not fully paid the contractor, and in no wise for more than the original contract price": *Henry etc. Co. v. Evans*, 97 Mo. 47. The lien is an incident which the law attaches to the transaction, and can be waived or discharged only by an agreement or understanding to that effect on the part of the person entitled to it. In the *City of Salem*, 7 Saw. 481, 10 Fed. Rep. <sup>140</sup> 843, Mr. Justice Deady, in construing this

identical statute, said: "It matters not, so far as the claims of the libelants are concerned, what controversy exists between Steffen and his contractors, or how the respondent is involved in it, whether as garnishee or otherwise. If they performed the work on the respondent's boat, as they allege they did, they have a lien thereon for its value, irrespective of the state of the accounts between him and Steffen, and are entitled to maintain this suit to establish their claim, and enforce such lien by the sale of the boat." The statute makes the boat liable to the lien of the laborer or materialman, if he complies with the statute, notwithstanding the owner has paid the contractor. In *Atwood v. Williams*, 40 Me. 409, the laborer's lien was enforced, though the contractor had been previously paid. "The aim of the law," as Barclay, J., said, "is to protect those whose material or labor has enhanced the value of property, against the business misfortunes or possible frauds of any middleman, at whose instance they furnished the same. It is made the interest of the owner for the protection of his property from liens to see that all valid debts of that nature are discharged by those who incur them. The lawmakers considered that, with the exercise of ordinary prudence, the owner would be in a better position to guard against loss under this law than subcontractors would be without the law. The owner may stipulate with the contractor to defer his payment until the time has passed for filing other liens, or to pay the subcontractors himself, or he may take security or any other suitable steps that circumstances may require for the protection of himself and of those whose labor and materials enter into the building upon its credit": *Ainslie v. Kohn*, 16 Or. 371; *Laird v. Noonan*, 32 Minn. 358; *Lowrey v. Cook*, 15 Nev. 58; *Albright v. Smith*, 2 S. Dak. 577; *Brinwell v. Mann*, 46 Minn. 285; *Spokane Mfg. Co. v. McClesney*, 1 <sup>141</sup> Wash. St. 609. These authorities lead to the conclusion that laborers or materialmen are not affected by the state of the account between the owner and contractor.

The judgment is affirmed.

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**APPEAL—RIGHT TO.**—Any person aggrieved by the decision of a lower court may appeal to the supreme court. Persons "aggrieved" are only those who have rights enforceable at law, and whose pecuniary interests might be established in whole or in part by the decree: *Briard v. Gondak*, 55 Me. 100; *note*, p. 526, and *note*; *Wiggins v. Swett*, 6 Me. 194; 30 Am. Dec. 710, and *note*.

**SHIPPING—MARITIME CONTRACTS.**—Contracts for building ships or vessels, or material furnished in their construction, are not maritime contracts: *The Scow M. Tuttle v. Buck*, 23 Ohio St. 565; 13 Am. Rep. 270, and extended note. See, also, the note to *Atlantic Works v. Tug Glide*, 34 Am. St. Rep. 309.

**ADMIRALTY—JURISDICTION OF STATE COURTS TO ENFORCE LIENS AGAINST SHIPS.**—A state statute creating a lien against vessels for repairs made in their home port, where the maritime law does not give such lien, and authorizing the enforcement of the lien in the courts of the state, is valid: *Atlantic Works v. Tug Glide*, 157 Mass. 525; 34 Am. St. Rep. 305, and note, with the cases collected.

**LIMITATIONS OF ACTIONS—RUNNING ACCOUNTS.**—WHEN STATUTE COMMENCES TO RUN: See the extended note to *Norton v. Larco*, 89 Am. Dec. 78.

**MECHANIC'S LIEN.**—WHETHER OR NOT CONTRACTOR CAN WAIVE LIEN OF MATERIALMAN: See the note to *Benedict v. Hood*, 19 Am. St. Rep. 699, and the extended note to *McMahan v. Morrison*, 79 Am. Dec. 426.

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## IN RE CLINE'S WILL.

[24 OREGON, 175.]

**WILLS—INSANE DELUSIONS.**—If there were facts or circumstances which would reasonably lead the testator to entertain a belief he possessed, such belief is not an insane delusion.

**WILLS, INSANE DELUSION.**—If, in a controversy between a husband and wife, in which is included a suit brought by her against him for divorce, some of his children testified for, and seemed to sympathize with, her, and against him, and he then formed an opinion that they were hostile to him and determined on that account to disinherit them, his will made years afterwards in consequence of that determination cannot be said to be the result of an insane delusion.

**WILLS—TESTAMENTARY CAPACITY.**—The fact that a testator when he made his will was seventy-five years of age, weak and feeble, nervous, irritable, absent-minded, and of feeble memory, does not establish his want of testamentary capacity, if he was of strong will and had a good understanding of all the business in which he engaged.

PROCEEDING by part of the children of Jacob Cline, deceased, to annul his last will and testament. A judgment was entered sustaining the will. Complainants appealed.

*John H. Mitchell, Albert H. Tanner, and Hiram E. Mitchell,* for the appellants.

*Richard Williams and Emmett B. Williams,* for the respondents.

<sup>176</sup> Per CURIAM. This was a proceeding instituted in the county court of Multnomah county by the contestants to have the order admitting the will of Jacob Cline, deceased, vacated, and the will set aside and declared void. The testator exe-

executed this will at Portland, Oregon, in August, 1888, and died at San Bernardino, California, in December of the same year. By its terms his children, Anne E. Bain, Mary P. Sax, Isabella Cook, and John Cline, and his grandchildren, Lewis Cline, Laura Cline, Kate Cline, and Antha Cline, the children of Antha Cline, a deceased daughter, were left the nominal sum of one dollar each, and all the rest of his property was bequeathed and devised to his other two children, Jacob Cline, Jr., and Jane Tunstall, who were appointed executor and executrix thereof without bonds. The county court sustained the validity of the will, and made an order reprobating it, from which the contestants appealed to the circuit court, where a decree was rendered affirming the order of the county court, from which the contestants appeal to this court.

The testimony discloses that from the time of his marriage until about 1862 the testator had been kind to his wife and affectionate to his children, but about that time he made a visit to the eastern states, and upon his return brought with him a woman whom he kept in his house against the protest of wife, who, in consequence of his misconduct, obtained a divorce from him. At the trial of that suit most of the children whom he disinherited were called as witnesses for their mother, and he then formed the determination to disinherit such of them as had appeared as witnesses for or sympathized with her. He never overlooked the part they had taken, or forgave them, and numerous witnesses testify to statements made by him to the effect that the contestants should never have <sup>177</sup> any of his estate for that reason, but the devisees of his will, being very young at that time, could neither testify for or otherwise aid either party, and the testator's feelings towards them were consequently kind and affectionate. The grounds upon which the will is alleged to be void are that the testator, at the time it was executed, was, and for many years previous had been, a monomaniac, or the victim of an insane delusion, in reference to the children who were disinherited, and had without any adequate reason conceived the idea that they had deeply wronged him by taking sides with their mother, and falsely testifying against him in the divorce suit between himself and his wife; that they did not respect him, and were trying to rob him of his property, and that while laboring under these impressions he formed a prejudice towards them, and dwelt upon their supposed misconduct, until he had become the victim of an insane delusion, under



the influence of which, and by means of the alleged inducement and fraudulent misrepresentations of the devisees, he made the will in question. It was held in *Potter v. Jones*, 20 Or. 240, that, if there were any facts or circumstances which would reasonably lead the testator to entertain the belief he possessed, such belief was not a delusion. Applying this rule to the facts disclosed in the case at bar, it appears that most of the disinherited children were witnesses in the divorce-suit against him, and he thought all sympathized with their mother, and these facts and circumstances led him to believe they were opposed to him, and were sufficient to support the conclusion he reached, and to establish the belief he possessed; hence such belief cannot be treated as a delusion.

The appellants contend that the testator, in consequence of old age and disease, was lacking in testamentary capacity. At the time the will was executed he was seventy-five years old, was weak and feeble, and had been quite ill with inflammatory rheumatism. He was afflicted with <sup>178</sup> catarrh, which affected his head, back, and spine, and was so nervous that it was difficult for him to raise any liquid to his mouth without spilling it. He was absent-minded and irritable, and his memory had failed him to quite an extent, particularly so after his rheumatic attack.

The testimony on this branch of the subject shows that notwithstanding his infirmities the testator was a man of strong will, and when he reached a conclusion upon a given question it was very difficult to change his opinion. Many witnesses who had known him for a long time, and whose veracity cannot be questioned, say that, although feeble, he possessed at the time the will was executed the same trait of character that he manifested in his younger days, that his mind had not lost any of its powers of reasoning, and that he had a good understanding of all business in which he was engaged. In *Chrisman v. Chrisman*, 16 Or. 127, it was held that neither old age, sickness, nor extreme distress or debility of body incapacitate, provided the testator has possession of his mental faculties, and understands the business in which he is engaged. We conclude from the foregoing that while the testator's memory may have been, and probably was, somewhat impaired with age and bodily infirmity, he had the necessary testamentary capacity, and executed his will according to his fixed determination made many years prior to its execution.

It is further contended that the execution of the will was the result of the undue influence, and the false and fraudulent representations of the devisees. A careful examination of all the testimony upon this subject leads us to the conclusion that the testator possessed a mind which none could influence or alter, that the opportunity was lacking for the exercise of such influence by the devisees, and that he executed his will in the way he had constantly indicated for a period of twenty-five years.

For these reasons the decree of the court below must be affirmed.

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**WILLS—INSANE DELUSIONS.**—A will is invalidated by a delusion where it is the result of the delusion, but not otherwise: *Lucas v. Parsons*, 24 Ga. 640; 71 Am. Dec. 147; *Middleditch v. Williams*, 45 N. J. Eq. 726. Aversion to relations is not evidence of insanity where ill-treatment is assigned as a reason for it, and there are grounds for believing it well founded: *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722. See the note to *Haines v. Hayden*, 35 Am. St. Rep. 579, and the extended note to *Pidcock v. Potter*, 8 Am. Rep. 186.

**WILLS—TESTAMENTARY CAPACITY—TEST OF.**—The true inquiry in every case is, Did the testator have at the time of making his will such mind and memory as enabled him to understand the business in which he was then engaged, and the effect of the disposition made by him of his property and the objects of his bounty: *Campbell v. Campbell*, 130 Ill. 466; *Smith v. Smith*, 43 N. J. Eq. 566; *O'Brien v. Dwyer*, 45 N. J. Eq. 689; *McCoon v. Alien*, 45 N. J. Eq. 708; *Reichenbach v. Ruddach*, 127 Pa. St. 565; *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828, and note, with the cases collected.

**WILLS—TESTAMENTARY CAPACITY—EFFECT OF OLD AGE.**—A testator's extreme old age is not of itself sufficient to render him incompetent to make a will (*Kirkwood v. Gordon*, 7 Rich. 474; 62 Am. Dec. 418), if sufficient intelligence remain: *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150, and note.

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## COMMERCIAL NATIONAL BANK v. CITY OF PORTLAND.

[24 OREGON, 188.]

**A MUNICIPAL CORPORATION IS LIABLE FOR ITS NEGLIGENT FAILURE TO COLLECT MONEYS DUE FROM PROPERTY OWNERS** for the improvement of a public street, and an action may be sustained by the contractor who did such work and is entitled to such moneys when collected, though in his contract he stipulated he would look to a special fund for payment, and would not compel the city, by legal process or otherwise, to pay for the improvement out of any other fund. There is nothing in this stipulation absolving the city from the duty of making the assessment and enforcing its collection, and its failure to perform such duty renders it answerable for the consequent damages.

ACTION against the city of Portland for damages resulting from its negligent inaction in the collection of an assessment upon real property for the improvement of a portion of Twelfth street. The work was done and warrants were issued to the contractors in October and November, 1887. In February, 1888, a temporary restraining order was issued in a suit against the city enjoining it from proceeding to collect the assessments. The city, on its part, had taken no action to terminate this order or the suit out of which it arose, and the assessments, therefore, remained uncollected and the plaintiffs without any fund from which payment could be made to them of the sums due for the improvement of the street. Judgment for the plaintiff. Defendant appealed.

*William T. Muir, city attorney, for the appellant.*

*George H. Durham and Harrison G. Platt, for the respondent.*

<sup>192</sup> LORD, C. J. The plaintiff claims that it was and is the duty of the defendant city to collect from the various owners of property abutting upon said Twelfth street the several sums ascertained by the defendant to be the cost of making said improvement, and the charges specifically made against the various parcels of land affected by and liable for said improvement; that the defendant has wholly failed and neglected to perform this duty, and has not collected from the property holders the money with which to pay the warrants described, and is making no effort so to do; <sup>193</sup> that, by reason of the alleged neglect of duty by the defendant, plaintiff claims to be damaged in the amount of said warrants and the interest thereon. The principal question then is, whether the city is liable for the payment of the warrants in question, in view of the stipulation requiring the contractor to look to a special fund for payment, and undertaking to exempt the city from general liability. The facts show that the contract under which the work was done was made on the eighteenth day of August, 1887, and that the improvement provided for therein was completed prior the sixteenth day of November, 1887, in accordance with the terms of such contract, and was thereupon accepted by the city, and warrants, made payable out of the fund for such improvement, were issued to the contractors, among which were the warrants assigned to the plaintiff. As several years have intervened since the issuance of

such warrants, and the city has failed and neglected to raise the special fund to pay them, the plaintiff has brought an action against the defendant for negligence, claiming that he is damaged in the amount of the warrants in question, and interest due thereon, and that the city is liable therefor. To defeat such action the defendant relies upon the stipulation in the contract, claiming that it limits the liability of the city to the special fund to be raised by assessments upon the property affected by the improvement, and confines the contractor's right of recovery to such fund. The stipulation provides that the contractor shall look for payment to the special fund, and that "he will not compel the city, by legal process or otherwise, to pay for the improvement out of any other fund," and the defendant contends, if any force or effect is to be given to such stipulation, that it is liable to pay the warrants in question only when such special fund is raised and collected, and consequently that the defendant is not liable generally in an action for damages upon them. This view would relieve the city of any liability <sup>134</sup> to pay such warrants until such special fund is raised and collected by assessments, although its failure to realize such fund may be due to its own neglect or unreasonable delay.

Under its charter the city is invested with the power to order local improvements, and afforded the means to raise the necessary funds to pay for them by assessments upon the property benefited thereby. When the city orders a local improvement the duty devolves upon it to put the necessary machinery in motion to raise the funds to pay for it by assessments upon the property affected. This duty devolved upon the city when it ordered the improvement of Twelfth street, so that when the defendant entered into a contract for doing the work, and the contractor stipulated to look for payment to the special fund to be raised by assessments, the obligation rested upon the city to prosecute in good faith, and with reasonable diligence, the means afforded to it under its charter to raise and collect the fund necessary to redeem its obligation. There is no pretense but that the obligation resting upon the contractor to perform the work and furnish the materials required has been satisfactorily performed and the improvements accepted. Having performed his obligation, the duty rested upon the city to discharge its obligation. "When the contractor," says Ruger, C. J., "had performed his work according to his contract, he had no duty remaining

to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government, over which he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligation. That was a power lodged in the hands of the city, and the clear intent of the contract <sup>195</sup> was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement; for an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty": *Reilly v. City of Albany*, 112 N. Y. 42. This doctrine, we think, is applicable to the case at bar. There is nothing in the stipulation of the contract absolving the city from the duty of making the assessment and enforcing its collection, hence the obligation rests upon it to make the necessary assessments, collect the same, and pay the contractor. The contractor can exert no control over its acts, nor has he any claim or lien against the property benefited by the improvement. There is no privity between the property owners on the line of the work and the contractor. The city alone can make the assessments and enforce their payment, so as to realize a fund out of which to pay the warrants in question; and it is the failure of the city to perform its duty in this regard upon which the general liability is predicated.

In *North Pacific Lumber etc. Co. v. East Portland*, 14 Or. 6, Thayer, J., says: "The improvement is supposed to be a benefit to the lot-owners referred to, and the lots affected are charged with the cost of making it. The city occupies the relation in the proceeding more of an agent than a principal. It does not undertake to pay the contract price for making the improvement out of the general funds of the city. I do not think it has any power to enter into such an agreement for the improvement of the city, but it does undertake to perform all the acts required by the charter intended to supply the requisite fund to defray the expenses attending it, and a failure to comply with any of the requirements of the charter by which the funds may be realized would subject it to a general liability." The distinction which is sought to be made between that case and the case at bar is not tenable.

The stipulation of the contractor to look to a <sup>196</sup> special fund did not absolve the city from the duty of putting the necessary machinery in motion to raise and collect such fund to redeem its obligation and to pay the warrants in question. When the contractor performed his contract the duty rested upon the city to make an active effort to discharge its obligation. Has it done it? The record discloses that the work was completed and accepted by the city in 1837. The plea of abatement which was overruled by the court shows that in February, 1888, a temporary injunction was obtained against the city. For five years the injunction suit has been permitted to lie. For more than five years the city has had the use of the improvement, and there is nothing to indicate that it has made any effort to press the injunction suit to trial. The present action has been pending since May, 1891, which includes a period sufficiently long to have prosecuted the injunction suit to a final determination, and yet the record shows, and the argument concedes, that nothing has been done in the premises. In view of these facts, has there been such unreasonable delay as would charge the city with liability for neglect of duty? It has been repeatedly held that it is presently liable, if the failure of the city to raise the fund and pay over the same to the contractor is due to its own neglect or unreasonable delay.

In *Cumming v. Mayor etc.*, 11 Paige, 596, it was held that it was the duty of the officers of the corporation to see that a proper assessment for the improvement was made, and that the money was collected thereon, and paid over to the contractor within a reasonable time after the completion of the improvement; and that, as the officers of the corporation had unreasonably neglected to compel a proper assessment to be made, the complainants were entitled to payment out of the general fund of the corporation. This case was approved and followed in *Baldwin v. City of Oswego*, 1 Abb. Dec. 62, in which the defendant <sup>197</sup> was held liable "on account of the neglect of its officers to enforce the legal instrumentalities provided for enforcing payment against the parties primarily chargeable with such payment." Nor is there any thing in the cases of *McCullough v. Mayor*, 23 Wend. 458, and *Lake v. Trustees*, 4 Denio, 520, cited and relied upon by the appellant's counsel, in conflict with this contention. In the former of these cases, Bronson, J., said: "If the common council has neglected that duty (that is, of putting the necessary ma-

chinery in motion), or has been wanting in diligence, an action on the case would perhaps lie," etc. In the latter, which was an action on a warrant drawn by the trustees of the village upon the treasurer, the same judge remarked that the question whether the plaintiff had a remedy on the case against the trustees for neglect of duty did not arise on the bill of exceptions. In *Buck v. City of Lockport*, 6 Lans. 251, Johnson, J., said: "The corporation cannot thus (that is, by neglecting to act) keep its creditors at bay, and then defend itself on the ground that its own officers and agents have not done what it is their duty to do." In *Richardson v. City of Brooklyn*, 34 Barb. 569, and *Hunt v. City of Utica*, 18 N. Y. 442, no negligence was shown, but the principle is recognized that for the negligence or unreasonable delay of the city to perform its duty it is liable. In the first of these cases the court says: "This shows a case of due diligence on the part of the council in attempting to fulfill the duty enjoined upon them by the charter. If they had unreasonably neglected or refused to make the assessment, or to take the necessary steps for the collection of the tax, or refused to pay over the money when collected, an action on the case might be sustained against them."

The theory is that when the municipality passes an ordinance for a local improvement it is its duty to prosecute with diligence the means afforded to it under its charter to realize the fund to pay for such improvement <sup>198</sup> out the property benefited. When, therefore, a city orders a local improvement, and enters into a contract for doing the work, containing a stipulation that the contractor will look for payment to the fund so realized, such stipulation does not absolve the city from the performance of its duty to put and keep in motion the machinery to obtain such fund, but the contract is based on the obligation of the city to perform its duty, in consideration of which the contractor stipulates to look for payment to the fund realized from its performance. So that if a city fails to perform its duty, or, owing to its neglect or unreasonable delay, fails to obtain such fund, it is guilty of a breach of duty, and is liable. The plaintiff's action rests upon this theory. We think the record discloses a case against the city of want of diligence and neglect in the performance of its duty; and, therefore, there was no error, and the judgment must be affirmed.



**MUNICIPAL CORPORATIONS—LIABILITY FOR THE NEGLIGENCE OR OMISSION OF ITS OFFICERS OR AGENTS:** See the extended notes to *Goddard v. Inhabitants*, 30 Am. St. Rep. 376, and *Perry v. Worcester*, 66 Am. Dec. 434.

## RECTOR OF ST. DAVID'S v. WOOD.

[24 OREGON, 393.]

### **SPECIFIC PERFORMANCE OF A BUILDING CONTRACT WILL BE DECREED**

WHEN it appears that it was to furnish stone of a peculiar kind and texture which could be furnished by the defendant only; that enough had been furnished to build two-thirds of the walls, and, if defendant is not required to furnish the residue, it will be necessary to use other stone, and thus destroy the harmony and beauty of the building, or to tear down the part already built, and rebuild with other materials. Though the court may not be able, owing to the defendant's pecuniary circumstances, to compel him to perform the entire contract, this will not deprive it of the power to compel him to permit plaintiff to take stone necessary to continue the work and to use defendant's appliances at the quarry.

**SPECIFIC PERFORMANCE.**—THE CONSIDERATION of a contract necessary to sustain a suit for its specific performance may consist either of some profit inuring to the promisor or some detriment sustained by the promisee.

*John W. Whalley, Reuben S. Strahan, and Martin L. Pipes,*  
for the appellant.

*Samuel H. Gruber,* for the respondents.

402 MOORE, J. The specific performance of a building contract will rarely be enforced (Pomeroy on Specific Performance, sec. 23) upon the theory, as announced by Sir Lord Kenyon, master of the rolls, in *Errington v. Aynsley*, 2 Brown Ch. 341, "that if one person would not build, another might be found who would," and for the reason given by Lord Thurlow in *Lucas v. Commerford*, 3 Brown Ch. 166, "that the court could not undertake to superintend the construction of a building." Such contracts have in some instances been enforced, but they were exceptions to the general rule, and are clearly stated by Mr. Justice Miller in *Ross v. Union Pac. R. R. Co.*, 1 Woolw. 26, as follows: "1. In each case the building was to be done upon the land of 403 the person who agreed to do it; 2. The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already by such conveyance on his part executed the contract; 3. In all of them the building was in

some way essential to the use, or contributory to the value, of the adjoining land belonging to the plaintiff."

The prayer of the complaint is for the specific performance of the building contract, provided it could be granted. The decree, however, does not fully comply with the prayer; if it had there might have been just reason for its reversal. The record shows that the stone which defendant agreed to furnish is of a peculiar kind, color, quality, and texture, and that no other stone of like character can be procured; that he had furnished enough of such stone to build about two-thirds of the walls, and, if plaintiff cannot procure a sufficient quantity of the same kind to complete the work, it will be necessary to use other stone and thus destroy the beauty and harmony of its building, or the walls must be taken down and rebuilt with other stone; that defendant is insolvent, and therefore unable to complete his contract, although he has received nearly the whole consideration therefor. Under this state of facts, can a court of equity decree a partial performance, so as to carry out as near as possible the original intent of the parties? The contract was to furnish the stone and other material and erect the walls. The defendant's pecuniary condition precludes a specific performance of that part of his contract which required him to furnish other necessary material and do the labor, if such a decree were possible: *Pomeroy on Specific Performance*, sec. 293; but, if he be incapacitated from performing it in the precise terms, the court will, if it is possible, decree a specific execution according to its substance, by making such variation from unessential particulars as the circumstances of the case require or permit: *Pomeroy on Specific Performance*, sec. 297.

Courts will not generally decree the specific performance of a contract to deliver personal property (*Waterman on Specific Performance*, sec. 16), and yet it was held in *Hapgood v. Rosenstock*, 23 Fed. Rep. 86, that "agreements for the assignment of a patent, and for the delivery of chattels which can be supplied by the vendor alone, are among those which will be specifically enforced." This decision was approved by the supreme court of Massachusetts in *Adams v. Messenger*, 147 Mass. 185; 9 Am. St. Rep. 679. Applying these rules to the case at bar, the defendant has stone which cannot be procured from any other quarry, and plaintiff must use it, or the harmony of its building will be marred, and, since the defendant cannot be required to do that which his pecuniary

condition forbids, he can be negatively required to specifically perform the contract by compelling him to allow the plaintiff to take the necessary stone to complete the building. It is a fundamental principle that equity will not decree the specific performance of a contract unless the undertaking to be enforced is founded upon a valuable consideration moving from the party in whose behalf the performance is sought: *Pomeroy on Specific Performance*, sec. 57. The contract which is sought to be enforced is under seal, and this constitutes primary evidence of a consideration: *Hill's Code*, sec. 753. It is sufficient, however, if some profit is to inure to the promisor, or some detriment to be sustained by the promisee: *Waterman on Specific Performance*, sec. 188. The record shows that the contract was awarded to the defendant, and that plaintiff has voluntarily advanced to him a large sum in excess of the amount it would have been compelled to pay under the contract as the work advanced. The defendant, having received the payment, ought not now to complain or say there is no consideration for the stone necessary to complete the building. The plaintiff has already paid for such stone, and the defendant ought not to object to its taking the necessary quantity, since the defendant's pecuniary condition will not permit him to supply it.

The record further shows that defendant has some derricks which he uses at his quarry and at the church-building for hoisting stone, which the decree provides the plaintiff may use. The stone cannot be taken from the quarry, nor be upon cars, or placed in the building, without the use of derricks or similar machines; and, since the defendant has them, he is contributing no more than his share when required to permit the use of them by plaintiff. Such use, however, does not mean their destruction, and they must be returned in as good condition as when received, the usual wear therefrom excepted. Because the contract has proved unprofitable to the defendant is no reason it should not be enforced as far as practicable. It was fairly entered into, and each party believed it could be completed for the consideration agreed upon, and the court, having granted such relief as was equitable under the circumstances of the case, its decree should be affirmed.

The recorder of conveyances of Benton county is enjoined from receiving for record any conveyance of or encumbrance upon the quarry premises. An injunction will not be granted

lie against a ministerial officer to restrain him from doing that which the law requires as a part of his duty, but since he has made default it must be presumed that he acquiesces in the decree.

Affirmed.

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**SPECIFIC PERFORMANCE—SUFFICIENCY OF CONSIDERATION.**—The consideration to warrant specific performance of a contract must be valuable or meritorious: *Woodcock v. Bennet*, 1 Cow. 711; 13 Am. Dec. 568. Specific performance of a contract will not be decreed unless the contract is founded upon a valuable consideration: *Wolfe v. Bradberry*, 140 Ill. 578. Specific performance of a contract will not be decreed unless it is founded on an actual and valuable consideration, and, under some circumstances, an adequate consideration: *Montgomery Palace Street Car Co. v. Stable Car Line*, 142 Ill. 315. An executory agreement upon a merely voluntary consideration will not be enforced in a court of equity: *Lynn v. Lynn*, 135 Ill. 18. See, also, the extended note to *Anderson v. Green*, 23 Am. Dec. 423.

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## UPTON v. HUME.

[24 OREGON, 420.]

**FROM A LIBELOUS PUBLICATION THE LAW IMPLIES MALICE, AND INFERS DAMAGE** if the publication is false, except in the case of privileged communications.

**LIBEL—PRIVILEGED COMMUNICATIONS DEFINED.**—A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be actionable, and this though the duty is not a legal one, but only a moral or social duty of imperfect obligation.

**LIBEL—CANDIDATE FOR OFFICE.**—It is both the privilege and the duty of the public press to discuss before the people the fitness and qualification of candidates for public office. Such a candidate puts his character in issue so far as respects such fitness and qualification.

**LIBEL, CANDIDATE, IMPUTING CRIME TO.**—A newspaper publication imputing to a candidate for office the commission of a crime, merely because he is seeking the office, is not privileged, and is actionable *per se*, the law imputing malice to the author and publisher. A publication attacking the private character of a candidate by falsely imputing to him a crime is not privileged by the occasion, and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters.

**NEWSPAPER LIBEL.**—THE FREEDOM OF THE PRESS guaranteed by the constitution does not confer upon proprietors of newspapers the right to publish with impunity charges for which others would be responsible. They are subject to the law of the land, and, when they are guilty of a false and defamatory publication, must answer in damages to the injured party.

**NEWSPAPER LIBEL.—TO PUBLISH OF A CANDIDATE FOR OFFICE** that he is a perjured villain, and has by his false swearing deceived the court, is not privileged either actually or conditionally.

**NEWSPAPER LIBEL.—THE REPUBLICATION OF LIBELOUS MATTER** by one newspaper copied from another does not constitute any justification, even though done in good faith with an honest belief in its truth, and for the purpose of influencing voters. That the libel was a repetition, instead of being an original libel, may be considered in connection with other circumstances in determining the good faith of the defendant and as tending to show want of actual malice, and thus mitigating damages.

**LIBEL.—EVIDENCE OF OTHER LIBELOUS OR SLANDEROUS CHARGES** may be given to the jury where they impute the same crime, and may fairly be construed as a renewal of the original charge, as tending to show express malice, and thus enhance the damages, but evidence cannot be received of actionable words spoken or published on another occasion charging a separate and distinct crime from that charged in the complaint, for the purpose of showing malice, nor for any other purpose.

**LIBEL.—IF A DEFENDANT PLEADS THE TRUTH OF A LIBELOUS PUBLICATION**, and in this respect is not sustained by the evidence, the jury should not be instructed that they may consider this as a repetition of the publication of the original charge, and in aggravation of damages and as evidence of malice, if the statute of the state provides that the defendant may in his answer allege both the truth of the matter charged, and any mitigating circumstances to reduce the damages, and whether he proves the justification or not, may give in evidence the mitigating circumstances. The jury should consider whether the justification was pleaded in good faith or merely for the purpose of reiterating the false charge. If for the latter purpose the plea may be regarded as in aggravation of damages and as evidence of malice, but the mere failure to make out the plea of justification is not of itself evidence of malice, nor does it aggravate damages or preclude the jury from mitigating damages if they believe that the defendant was free of malice, and had good reason to believe the libel he published was true.

**ACTION** by J. H. Upton to recover damages for a libelous publication in the *Gold Beach Gazette*, a newspaper published by the defendant. The plaintiff at the time of such publication was a candidate for the office of joint representative for the counties of Coos and Curry, in which the newspaper was circulated. The charges stated that the plaintiff had acquired the reputation of "being a loathsome, venomous thing, without shame; a man without a spark of manhood, a betrayer of his party, a citizen whose word is not worth a straw, a vile and cowardly slanderer, an infamous scoundrel, and a perjured villain." The act of perjury was also said to have deceived the court, and to have been the cause of illegally granting a divorce. The defendant in his answer admitted the publication, but pleaded, first, the truth in justification, and second, as a matter of inducement, explanation, and justification, that the plaintiff was a candidate for office, and

that the charges complained of were a republication of charges published some years previously by one Walter Sutton in the *Port Oxford Tribune*; that the defendant had sufficient cause to believe, and did believe, that the charges were true, that the plaintiff was an unfit person for the office which he sought, and in such belief that the defendant published the charges in good faith, without malice, and for the sole purpose of advising the voters of Coos and Curry counties of the true character of the plaintiff. Verdict and judgment for the plaintiff for five hundred dollars. Defendant appealed.

*S. H. Hazard*, for the appellant.

*William M. Kaiser and J. M. Siglin*, for the respondent.

428 BEAN, J. 1. Before considering the other assignments of error we wish to advert to the question raised by the motion for a nonsuit, and by certain instructions given and refused by the trial court, and that is whether the publication complained of was *prima facie* privileged by the occasion, and whether this action can be maintained by plaintiff without proof of express malice. The general rule is that in the case of a libelous publication the law implies malice, and infers some damages, if the publication is false, but to this rule there are certain exceptions in what are known as "privileged communications." Such communications are usually divided into several classes, with only one of which we are concerned at this time, and that is generally stated thus: "A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter, which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in *Harrison v. Bush*, 5 El. & B. 344, and has been generally approved by judges and text-writers. Within this rule it is held that it is not only the privilege, but the duty, of the public press to discuss before the electors the fitness and qualification of candidates for public 429 office conferred by the election of the people; and, when a man becomes such a candidate, he must be considered as putting his character in issue, so far as respects his fitness and qualification for the office, and that every person who engages in the discussion, whether in private conversation, in public speech,

or in the newspapers, may, while keeping within proper limits and acting in good faith, be regarded and protected as one engaged in the discharge of a duty. But it is not believed that this rule can be legitimately carried to the extent of justifying a publication which imputes to a candidate for office the commission of a crime, merely because he is seeking office. "The authorities fully sustain the position," says Green, P., in an able opinion on the subject, "that a publication in a newspaper, made either of a public officer or a candidate seeking an elective office from the votes of the people, which imputes to him a crime or moral delinquency, is not a privileged communication, either absolute or conditional; but such publication is *per se* actionable, the law imputing malice to the author or publisher": *Sweeney v. Baker*, 13 W. Va. 158; 31 Am. Rep. 757. And in *Seely v. Blair*, Wright, 686, it was said by Wright, J: "As to the point urged, that the plaintiff was a candidate for office, and the defendant an elector, I need only say the relation of the parties to each other, or to the public confers upon the defendant no right to utter falsehood and calumny. An elector may freely canvass the character and pretensions of officers and candidates, but he has no right to calumniate one who is a candidate for office with impunity. If the law sanctioned such a course it would drive good men from the administration of public affairs, and throw our government into the hands of the worthless and profligate."

So, also, in *Bronson v. Bruce*, 59 Mich. 474, 60 Am. Rep. 307. Mr. Justice Champlin says: "The electors of a congressional district are interested in knowing <sup>430</sup> the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress; and it is the right and privilege of any elector or person also having an interest to be represented, to freely criticise the acts and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. 'Slander,' says Judge Overton, 'is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy, indeed, would be any people, when in the exercise of one right, you destroy as important a one. Let his talents, his virtues, and such vices as are likely to affect his public character, be freely discussed, but no falsehoods be propagated.' To hold that false charges



of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office, and leave the field to the profligate, the unprincipled, and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man worthy of the position would consent to stand for an office, and have his reputation tarnished, his good name scandalized, in the face of the whole community, if such doctrine as this is to prevail. Besides, under the guise of assisting the people to select a fit man, the voters are deceived by falsehood, and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated, one upon the candidate, the other in misleading the voter. Under such a rule the advocates of both or all candidates would let fly their poisoned shafts of defamation, and charges, to be met with countercharges, until the bewildered <sup>431</sup> voters, not knowing who or what to believe, must of necessity shut their eyes to the fitness and character of the candidates, and join the ranks of the party whose banner bears the inscription, 'Principles, not Men.' "

The rule we gather from the authorities is that the fitness and qualification of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper, or by a voter or other person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of voters, of charges affecting the fitness of a candidate for the place he seeks, so long as it is done honestly and without malice. Nor will such publication be actionable without proof of express malice, although it may be harsh, unjust, and unnecessarily severe, for these are matters of opinion of which the party making the publication has a right to judge for himself. In the case of such a publication the occasion rebuts the inference of malice which the law would otherwise raise from its falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. But when the publication attacks the private character of a candidate, by falsely imputing to him a crime, it is not privileged by the occasion, either absolutely or qualifiedly, but is actionable

*per se*, the law implying malice; and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can be justified only by proof of their truth: *Commonwealth v. Clapp*, 4 Mass. 163; 3 Am. Dec. 212; *Curtis v. Mussey*, 6 Gray, 261; *Aldrich v. Press Printing Co.*, 9 Minn. 133; 86 Am. Dec. 84; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102; *Hamilton v. Eno*, 81 N. Y. 116; *Commonwealth v. Wardwell*, 136 Mass. 164; *Barr v. Moore*, 87 Pa. St. 385; 30 Am. Rep. 367; *Seeley v. Blair*, Wright, 358. 432 If it can be said that the cases of *Bays v. Hunt*, 60 Iowa, 251, *Mott v. Dawson*, 46 Iowa, 533, and *State v. Balch*, 31 Kan. 465, when read in the light of the facts, announce a contrary doctrine, they do not seem to us to be supported either by reason or the weight of authority. To permit a defendant, who has published of a candidate false and defamatory statements concerning his private acts and character, on being pursued in the courts for this grievous wrong, to say in justification that he was actuated by no ill-will or malice toward the plaintiff, but his motives were pure and his conduct actuated only by a desire for the public good, would abandon candidates to all of the fierce tempests of defamation which either personal spite or political interest may suggest. The only safe evidence of a man's intentions are his acts, and if he accuses another of a crime, he must conclusively be presumed to have intended to injure him. Let the acts, conduct, and public record of a candidate, so far as it may affect his fitness or qualification for office, be the subject of free and vigorous comment, so long as it is done in good faith; but when his private life is assailed by imputing to him a crime, let his accuser either answer in damages, or prove the truth of the charge.

2. The term "freedom of the press," which is guaranteed under the constitution, has led some to suppose that the proprietors of newspapers have a right to publish with impunity charges for which others would be held responsible. This is a mistake; the publisher of a newspaper possesses no immunity from liability on account of a libelous publication, not belonging to any other citizen. In either case the publisher is subject to the law of the land, and, when the publication is false and defamatory, he must answer in damages to the injured party: *Barnes v. Campbell*, 59 N. H. 128; 47 Am. Rep. 183; *Mallory v. Pioneer-Press Co.*, 34 Minn. 521; *Detroit*

*Daily Post v. McArthur*, 16 Mich. 452; *Sheckell v. Jackson*, <sup>423</sup> 10 Cush. 25. As was said by Coleridge, J., in *Davison v. Duncan*, 7 El. & B. 281, 90 Eng. Com. L: "There is no difference in law whether the publication is by the proprietor of a newspaper or by some one else. There is no legal duty on either to publish what is injurious to another, and, if any person does so, he must defend himself on some legal ground." Judge Drummond says: "We all desire the entire freedom of the press, but it has never been understood as authorizing the bringing of charges against a man of his having committed a crime unless those charges were true. Now, there is nothing in this plea to indicate that these charges were true, but only that they had reason to believe that there was something in them, and that they were made in good faith and for honest purposes by them as the conductors of a public journal. That will not do. It would be tolerating charges in the public press against individuals simply under color of what was claimed to be a criticism. It may be said here that the motive was an honest one, but I hardly think that with an honest motive a journalist has a right to proclaim to the world that a particular individual is a thief or a murderer, or that he has committed any other crime in the catalogue of crimes. The only thing that can justify that is that it is true. Under our law, if it is true, he can make it. All public men, if this were the rule, would be at the mercy of every journalist, and they could launch charges against such a man with entire impunity. I do not feel inclined to adopt any rule which would allow such a license": *Smith v. Tribune Co.*, 4 Biss. 477.

3. The publication complained of in the case under consideration imputed to the plaintiff a crime of the most infamous character—that of being a "perjured villain," and by his false swearing deceiving the court—and, under the law, was not privileged, either actually or conditionally, although the plaintiff was at the time a candidate for an elective office. Nor does the admitted fact that it was but <sup>424</sup> a republication of what Sutton had previously published amount to a justification, even if done in the utmost good faith, and with an honest belief in its truth, and for the purpose of informing the voters. A newspaper cannot copy, without liability, even in the way of news, a libel from another paper: *Davis v. Bladden*, 17 Or. 259. But the fact that it was so copied may, and should, be considered, together with all the other circum-

stances of the publication, when properly pleaded, in determining the good faith of the defendant, and as tending to show want of actual malice, and thus go in mitigation of damages: *McDonald v. Woodruff*, 2 Dill. 244; *Hinkle v. Davenport*, 38 Iowa, 355; *Hewitt v. Pioneer-Press Co.*, 23 Minn. 178; 23 Am. Rep. 680. We are of the opinion, therefore, that no error was committed by the trial court in overruling the motion for a nonsuit, or in instructing the jury that malice was implied from the publication, and that the previous publication by Sutton was no defense.

4. The next assignment of error is in the admission, for the purpose of showing malice in fact, of proof that after the publication complained of, and before the commencement of this action, the defendant, in the presence of divers persons, said that "the men that voted for that old forger Upton were thieves, robbers, and sons of bitches." If these words can be considered as making any charge against the plaintiff, it is that of forgery, and as no such charge is alleged in the complaint, the only question presented by the exception is whether, in an action for libel, evidence of a charge of a different nature and at a different time from that alleged in the complaint can be given for the purpose of showing malice, or the animus of the defendant in the publication complained of. Upon this question the authorities are in conflict, but, in our opinion, the better rule seems to be that where the subsequent words or publication impute the same crime, or <sup>438</sup> may fairly be considered as a renewal of the original charge, they may be given in evidence, as tending to show express malice, and to enhance the damages: *Leonard v. Pope*, 27 Mich. 145; but that evidence cannot be given of actionable words spoken or published on another occasion, and charging a separate and distinct crime from that charged in the complaint, for the purpose of showing malice, or for any other purpose, for the reason, as stated by Parker, C. J., that "this is a different calumny for which the plaintiff has a right to his action, and, though it may tend to prove malice as to the first words, so, also, will it necessarily go to enhance the damages, for no jury can say how much or how little of the damages were given on account of this second charge: *Bodwell v. Swan*, 3 Pick. 376. To the same effect are *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762; *Howard v. Sexton*, 4 N. Y. 157; *Frazier v. McCloskey*, 60 N. Y. 337; 19 Am. Rep. 193; *Distin v. Rose*, 69 N. Y. 122; *Barr v. Hack*, 46 Iowa, 308. This is recognized

as the better rule by Mr. Townshend in his work on Libel and Slander, section 392; and in a note to Odgers on Libel and Slander, at page 271, Mr. Bigelow, a writer of recognized learning and ability, after a careful review of the authorities in this country, reaches the conclusion that: "By the better authorities evidence of the publication of defamation upon the plaintiff other in substance than that sued for is not admissible on grounds of policy." The distinction between the admissibility as evidence of charges of a nature different from those in suit and the repetition of the charges made in the complaint seems to be put upon the ground that a repetition of the libel or slander and the original offense may be practically treated as one wrong, and as to the repetitions used in evidence, all barred by the one judgment: *Leonard v. Pope*, 27 Mich. 145; *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762; and *Frazier v. McCloskey*, 60 N. Y. 337; 19 Am. Rep. 193; which, obviously, could not be true of the publication of a different charge. The repetitions <sup>436</sup> made use of in evidence in a particular trial are treated as barred by the judgment, because the jury are presumed to have considered them in estimating the damages for the original publication. If, however, charges of a different nature are admitted in evidence for the purpose of showing animus—and they certainly could not be competent for any other purpose—the jury may indeed be instructed that they must not give damages therefor, yet, as has been remarked, such instruction will be wasted upon the average, and perhaps upon a highly cultivated jury: *Root v. Lowndes*, 6 Hill, 518; 41 Am. Dec. 762. For this reason it is thought best to hold that "such evidence is not admissible for any purpose." The subsequent defamation given in evidence in this case, if true, was a distinct calumny, for which the plaintiff had a right of action, and, indeed, such action was pending at the time it was given in evidence, and hence we think its admission was error.

5. The next assignment of error is in the instruction to the jury that if the plea of the truth of the charge in justification is not sustained by the evidence, "the jury may consider that as a repetition and republication of the original charge, and consider the same in aggravation in assessing the damages, and as evidence of malice on the part of defendant against the plaintiff." It was formerly the law that if the defendant in a libel suit pleaded the truth in justification, and failed to establish such plea, it was considered as evidence of malice,

and in aggravation of the injury, and he was precluded from asking any mitigation of damages even if the plea was made in good faith and with an honest belief that it was true: *Bush v. Prosser*, 11 N. Y. 366. But section 91 of the code of this state, which provides that the defendant in his answer may allege both the truth of the matter charged, and "any mitigating circumstances to reduce the damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances," has changed the ~~old~~ rule, and under this section the damages are not necessarily affected by a failure to make good a plea of justification. It will depend upon the motive with which the plea was interposed, and the good faith of the defendant. If, under the color of justification, the defendant seeks to reiterate and perpetuate his slander, it may be considered by the jury as evidence of malice, and in aggravation of damages; but where the plea is made in good faith, and all that can be said is that he has failed to fully support it by competent proof, we do not see the justice of applying a rule to him not applicable to the other litigants who happen to fail in a *bona fide* defense. The result of the decisions of the state of New York, under a statute like ours, is that the mere inability to establish a justification is no evidence at all of malice, or in aggravation of damages, nor will it preclude the defense from asking that the damages be mitigated where it appears that he was free from malice, and had good reason to believe the libel that he published to be true: *Bush v. Prosser*, 11 N. Y. 366; *Bisbey v. Shaw*, 12 N. Y. 67; *Klink v. Colby*, 46 N. Y. 427; 7 Am. Rep. 360; *Distin v. Rose*, 69 N. Y. 122; *Spooner v. Keeler*, 51 N. Y. 527. In *Distin v. Rose*, Church, C. J., says: "The code has made this change in the law as it previously stood, that, although the justification is not sustained, yet the facts adduced for that purpose may be used in mitigation of damages if they tend to show good faith or a belief in the truth of the words uttered. But when there is a total failure of proof tending in this direction, and the circumstances evince malice in reiterating the slander in the pleadings, it is allowable for the jury to take the circumstances into consideration: *Thorn v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 561, and cases cited."

Indeed, the rule of the common law has been deemed so harsh and unjust that it has been modified in this country so that an approved plea of the truth is probably at the present day nowhere held to be necessarily evidence ~~of~~ of malice,

but the question now turns upon the circumstances of the plea: Odgers on Slander and Libel, sec. 274, note, where the authorities are collated; *Sloan v. Petrie*, 15 Ill. 425; *Harbison v. Shook*, 41 Ill. 141; *Hawver v. Hawver*, 78 Ill. 412; *Pallet v. Sargent*, 36 N. H. 496; *Proctor v. Houghtaling*, 37 Mich. 41; *Ransone v. Christian*, 49 Ga. 491; *Henderson v. Fox*, 83 Ga. 233; *Ward v. Dick*, 47 Conn. 300; 36 Am. Rep. 75. Now, in this case the defendant gave evidence tending to support the plea of justification. Indeed, it was substantially admitted on the trial that the plaintiff did make an affidavit in proof of the publication of the summons in the divorce case of *Moore v. Moore*, which was untrue, his explanation being that it was made by mistake. Upon the other plea, that he committed perjury in the case of the *State v. Madden*, no evidence as to its truth was offered by the defendant, but he gave evidence tending to show that it was made in good faith, and with an honest belief at the time that it was true and could be sustained by the proof. It was therefore error to instruct the jury unqualifiedly that, if the defendant failed to sustain the plea of justification, they might consider it in aggravation of damages. It should have been left to the jury to decide, from the evidence and the manner and spirit with which the defense was conducted, whether the real object of the plea was to defend the action with a reasonable expectation of success, or to repeat the original slander. It follows that the judgment of the court below must be reversed and a new trial ordered. Reversed.

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**LIBEL—MALICE—WHEN IMPLIED.**—Every willful and unauthorized publication imputing to a business man conduct which is injurious to his character and standing is a libel, and implies malice: *Mitchell v. Bradstreet Co.*, 116 Mo. 226; 38 Am. St. Rep. 592, and note. Any publication injurious to the character of another and not shown to be true, or to have been justifiably made, is actionable, malice being inferred in such a case: *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; 34 Am. St. Rep. 636, and note; *Byrd v. Hudson*, 113 N. C. 203. See the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 337.

**LIBEL—PRIVILEGED COMMUNICATION DEFINED.**—A libelous communication is regarded as privileged, if made *bona fide* upon a subject in which the party communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and extended note; *Rotholz v. Dunkle*, 53 N. J. L. 438; 26 Am. St. Rep. 432, and note; *Polasky v. Minchener*, 81 Mich. 280; 21 Am. St. Rep. 516, and note; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794. See the note to *Conroy v. Pittsburg Times*, 23 Am. St. Rep. 191.



**LIBEL—CRITICISM OF CANDIDATE FOR PUBLIC OFFICE.**—When one becomes a candidate for public office he thereby deliberately places his conduct, character, and utterances before the public for their discussion and consideration. They may be criticised according to the taste of the speaker or writer, and the law will protect him in so doing, provided his statements of or reference to the facts upon which their criticisms are based observe an honest regard for the truth: *Belknap v. Ball*, 83 Mich. 583; 21 Am. St. Rep. 621, and note; *Wheaton v. Beecher*, 66 Mich. 307; extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 349. But false statements defamatory of the character of a candidate for public office, although made in good faith, are not privileged: *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329, and note. See, also, the extended note to *Banner Pub. Co. v. State*, 57 Am. Rep. 223.

**LIBEL—LIABILITY OF NEWSPAPERS.**—A newspaper proprietor is liable for what he publishes in the same manner as any other individual: *Edwards v. San Jose Printing Society*, 99 Cal. 431; 37 Am. St. Rep. 70, and note; *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544. Newspapers are not at liberty, under a real or supposed sense of social duty, to publish defamatory articles about individuals: *Democrat Pub. Co. v. Jones*, 83 Tex. 302. The question of newspaper libel is thoroughly discussed in the extended notes to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333, and *Ast- rich v. Press Printing Co.*, 86 Am. Dec. 89.

## FOSHIER v. NARVER.

[24 OREGON, 441.]

**JUDGMENT OF SISTER STATES.**—THE JURISDICTION of a court of a sister state to render a judgment which is sought to be enforced in this state may be here inquired into. The defendant is entitled to show that he was not in fact served with process, and, as a consequence, that the court never acquired jurisdiction over him.

**JUDGMENT OF SISTER STATE, SERVICE ON DEFENDANT BY WRONG NAME.** If process is served on the defendant personally, the fact that he was therein designated by an incorrect name, as where his name was J. N. and he was designated as P. J. N., such service is valid, and supports a judgment based thereon, and such judgment cannot be collaterally attacked by proving that the person named in the process as defendant was not the person on whom it was in fact served. If the person served failed to appear and show that the plaintiff was not entitled to relief against him because he was the wrong party and not liable, the judgment establishes the fact that he was the right party and that the plaintiffs were entitled to relief against him.

**JUDGMENT, JURISDICTION, EVIDENCE ATTACKING.**—If a judgment is entered against J. N. upon the personal service of process upon him in a suit against P. J. N. he is not entitled in an action upon such judgment to attack the jurisdiction of the court by proving that the note sued upon, and for which judgment was rendered, was executed by P. J. N. and not by J. N., upon whom process was served and against whom the judgment was entered.

ACTION against J. Narver on a judgment entered in the state of Iowa.

*Ramsey & Fenton*, for the appellant.

*J. E. Magers and James McCain*, for the respondent.

<sup>442</sup> LORD, C. J. This is an action upon a judgment of the district court obtained in the state of Iowa. The plaintiff alleges, in substance, that on the second day of September, 1891, in an action wherein William E. Foshier, the plaintiff herein, was plaintiff, and the defendant John Narver, was defendant, a judgment was rendered by said court in favor of this plaintiff and against the defendant for six hundred and seventy-five dollars damages, and for six dollars costs and disbursements, etc. The answer denies the material allegations of the complaint, and avers that during all the time for more than ten years last past the defendant was, and now is, a resident of the state of Oregon; that he was not at any time or place or in any manner served with notice, summons, or process in said action prior to the rendering of such judgment. The reply denies the new matter contained in the answer. Upon issue being thus joined a trial was had resulting in a verdict for plaintiff, and, a judgment being rendered thereon, the defendant appeals. The errors assigned are the giving of certain instructions by the court and the refusal to give certain instructions requested by the defendant.

1. The judgment rendered in the Iowa court is founded on a note made and signed by W. F. Narver and P. J. Narver at Ottumwa, Iowa, on the 20th of November, 1874, due two years after date, and payable to J. W. Kitch. The contention for the defendant is: 1. That the service of process upon him in that case was on the wrong party; and 2. That the jury had the right to consider the fact that the note sued on was signed by P. J. Narver, and not by him, in corroboration of his testimony <sup>443</sup> to that effect. The doctrine is now well settled that the constitutional provision that full faith and credit shall be given to the judicial proceedings of other states does not preclude inquiry into the jurisdiction of the court in which the judgment was rendered over the subject matter, or the parties affected by it, nor into the facts necessary to give such jurisdiction: *Thompson v. Whitman*, 18 Wall. 457; *Freeman on Judgments*, secs. 562, 563; *Black on Judgments*, sec. 901. A defendant has a right to show by proof that he had not in fact been served with process, and, as a

consequence, that the court never acquired jurisdiction over his person: *Knowles v. Logansport etc. Coke Co.*, 19 Wall. 58.

2. As the defendant must bring his proof within this rule it is essential, in determining whether his contention is tenable, to understand the facts upon which it is founded. The transcript of the proceedings in the Iowa court shows that the defendant in that action was J. or John Narver, and the same name as the defendant in the present case. The notice or summons was addressed to J. Narver, defendant, and the return upon it is as follows:

"This notice came into my hand the seventh of November, 1891, and I hereby certify that I personally served the same on the within named J. Narver, by reading the same to him, and offered to deliver him a copy, but he refused to take it, and waived a copy of the same, in Troy township, Monroe county, Iowa, on the seventh day of November, 1891.

"[SIGNED] DANIEL McCARTY."

"I, Daniel McCarty, being first duly sworn, depose and say that the above and foregoing return of the within notice is correct; that I served the same as above set forth.

"[SIGNED] DANIEL McCARTY."

"Subscribed and sworn to before me this ninth day of November, 1891. Signed this ninth day of November, 1891.

"C. B. FOSHIER, Notary Public [SEAL]."

The defendant admits that he was in that county and state at the time and place the return shows that he was personally served, and that a person came to him then and <sup>464</sup> there, and asked him if his name was Narver, which he answered in the affirmative; that this person read a notice to him directed to P. J. Narver, in an action in which W. E. Foshier was plaintiff and P. J. Narver was defendant, when he told him his name was not P. J. Narver, but John Narver, at which such person wrote, or seemed to write, something upon a paper. Upon this state of facts the defendant contends that if the notice served upon him was directed to P. J. Narver in a case against P. J. Narver, the service was upon the wrong party, and that he had a legal right to disregard it, as the service of such person could give the court no jurisdiction of his person. This contention is based on the idea that the defendant's testimony contradicts the proof of service, because it shows that the name in the notice is not the name of the party served, and hence the service is on the wrong party, which he may

disregard. But it by no means follows that the wrong party was served, or that there was no legal service because the summons was addressed in a name differing from the name of the defendant served, as P. J. Narver for John Narver. For all that, the service may be on the right party. The name is a means of identity, but the right party may be served by a wrong name; it is not the name that is sued, but the person to whom it is applied. Whether the defendant served was the right or wrong party depended, not upon his name, but whether he was the party liable. Service upon a party by a wrong name is a good service and gives the court jurisdiction. If a party served by a wrong name fails to appear and make a defense, or submits to a judgment by a wrong name, the judgment will bind him as effectually as though rendered in his right name.

In proceedings of this character the defendant may attack the jurisdiction, and show that he had not in fact been served, and that in consequence the court never acquired jurisdiction of his person. This is the object of <sup>445</sup> the defendant's testimony. He sought to defeat the jurisdiction of the court which pronounced the judgment on which he is sued, by proof that he had never been in fact served with process. This was the issue to be tried. The return shows that he was personally served, and specifies the time and place, and he admits that he was so served, but says that the notice served upon him was addressed to P. J. Narver and not J. Narver. Process served on a man by a wrong name is as really served on him as if it had been served upon him by his right name. In such case it seems to us that the court acquires jurisdiction over his person, and, unless he appears and puts in his defense, the court is authorized to proceed to judgment. Assuming, then, that the notice served upon the defendant ran to the name of P. J. Narver, it does not follow, as a legal or logical consequence, that a service of such notice on J. Narver was service on the wrong party. On the contrary, after the defendant was so served, if he failed to appear and show that the plaintiff was not entitled to relief against him, because he was the wrong party, and not liable, when he had an opportunity to be heard on that question, the judgment established the fact that he was the right party and the plaintiff's right to relief against him.

Mr. Van Fleet says: "If John Smith is sued, and service be made personally on the wrong John Smith, he must appear

and defend himself. He cannot successfully fight the officer who seizes his property on execution, by showing that he is not the real defendant. The reason is a very plain one. He was afforded an opportunity to make that defense before judgment. The cases all agree on this point. But suppose the complaint and summons called for George Jones, and John Smith is served. How does that differ from the case just put? It is a judicial assertion that the true name of the person served is George Jones, and he is afforded an opportunity to appear and show that <sup>446</sup> his name is not Jones, and that the plaintiff is entitled to no relief against him. All the plaintiff can possibly do is to afford him this opportunity. Perhaps the plaintiff stands ready to show that his true name is George Jones, and that he does wrongfully withhold the relief demanded. A judgment in favor of the plaintiff necessarily establishes his right to the relief given against the person served": Van Fleet on Collateral Attack, sec. 367. It would seem, therefore, that the Iowa court had jurisdiction of the defendant, and his contention is not tenable.

3. We come now to the error assigned upon which the reversal of the judgment is sought. The court below, considering that the testimony of the defendant tended to contradict the proof of service, submitted it to the jury. The record discloses that counsel for the defendant attempted to argue to the jury that they had a right to consider the fact that the note sued on and set out in the Iowa record was signed by P. J. Narver and not the defendant, as corroborative of the defendant's testimony contradicting the proof of service, but the court refused, upon objection, to allow counsel to so argue. The instruction asked and refused and the instruction given, assigned as error, are intended to save and bring up this point. It will be sufficient to say that the court told the jury that they "could not consider the copy of the note sued on as affecting the question of serving notice." The only issue to be tried was whether the defendant was served with process. How the fact that the note was signed by P. J. Narver contradicted the proof of service it is difficult to comprehend. Such fact did not show that the return was false, or that the defendant was not served with the process. Neither the note nor the names upon it could throw light upon the question of service, though they might on the liability which is not now involved. It follows that the judgment must be affirmed.

**JUDGMENTS OF SISTER STATE—JURISDICTION—RIGHT TO INQUIRE INTO.** The record of a foreign judgment may be contradicted as to facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity: *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877; *Marx v. Fore*, 51 Mo. 69; 11 Am. Rep. 432, and extended note; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299, and note; *People v. Dawell*, 25 Mich. 247; 12 Am. Rep. 280, and note. The judgment or decree of a court of a sister state may be examined into here for the purpose of ascertaining whether such court had jurisdiction: *Starbuck v. Murray*, 5 Wend. 148; 21 Am. Dec. 172, and note; *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447, and note; *Bissell v. Briggs*, 9 Mass. 462; 6 Am. Dec. 88, and note; *Wernwag v. Pauling*, 5 Gill & J. 500; 25 Am. Dec. 317, and note. The judgment record of another state may be collaterally impeached by extrinsic evidence showing that the court pronouncing the judgment did not have jurisdiction: *In re James*, 99 Cal. 374; 37 Am. St. Rep. 60, and note.

**SERVICE OF PROCESS** upon Asher B. Bates will not support a judgment against Ashley B. Bates: *Bates v. State Bank*, 7 Ark. 394; 46 Am. Dec. 293, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**CARPENTER v. UNITED STATES LIFE INS. CO.**

[161 PENNSYLVANIA STATE, 2.]

**INSURANCE, LIFE—INSURABLE INTEREST.**—A young woman in whom an elderly man had taken an interest so far as to provide her with means to obtain an education, and also to give her employment, and who, from his conduct and expressions of intention, had a right to expect him to continue his *quasi* parental care towards her, has an insurable interest in his life, and therefore an assignment by him to her of a policy which he had effected on his life is valid and enforceable.

**INSURANCE, LIFE.—TO CREATE AN INSURABLE INTEREST IN THE LIFE OF ANOTHER KINSHIP** is not necessary. It is sufficient if the relationship between the insurer and the beneficiary is one of mere friendship, if the circumstances show that the loss of the life of the former will result in pecuniary loss to the latter.

*H. W. Watson and W. S. McLean*, for the appellant.

*C. La Rue Munson, S. J. Strauss, and Addison Candor*, for the appellee.

<sup>12</sup> **DEAN, J.** Alanson B. Tyrell, a man about sixty years of age, living with his family near Wilkes-Barre, had in his house, as a domestic, a poor girl named Adaline Carpenter. So far as appears from the evidence, prompted solely by a benevolent and kindly disposition, this old man befriended this girl; sent her to school and paid her expenses; in return, she at times, for small wages, performed some services for him, such as keeping his books and copying his letters; he was a designer and builder of coal-breakers, and seems to have had considerable business. On the 10th of December, 1892, he took out a policy of insurance on his life in the sum



of two thousand dollars, payable to himself in the defendant company; he paid the first annual premium, one hundred and four dollars and eighty-four cents. Thirteen days thereafter, on the 23d of the same month, he assigned the policy in writing to Adaline Carpenter, sealed it in a package, and delivered it to her with the injunction not to open it until after his death. Notice of the assignment, as provided by the policy, was duly given the company, and, without objection, acknowledgment of the notice was made by indorsement<sup>13</sup> on a duplicate. On April 1, 1893, Tyrell died. Adaline Carpenter inspected the package delivered to her, found in it the policy regularly assigned to her, made proper proof of the death of the insured, and demand for payment. The company, on the ground that the policy was a wagering contract, refused payment. Thereupon this suit was brought, and the learned judge of the court below, holding that, so far as concerned this plaintiff, the contract was a wagering contract, and therefore void, nonsuited her, and from that judgment we have this appeal.

The judgment of the court below was based on *Gilbert v. Moose*, 104 Pa. St. 74; 49 Am. Rep. 570; *Meily v. Hershberger*, 15 Week. Not. Cas. 186; *Downey v. Hoffer*, 110 Pa. St. 109; and that line of cases, which hold that the absolute assignment of a policy to one having no interest in the life of the insured, the assignor parting with all control over the policy, renders it a wagering contract as to such assignee, and he cannot recover thereon.

It seems to us the learned judge's conclusion is not drawn from all the material facts, but only from a part of them. At the trial counsel on both sides admitted the following facts, which were put upon the record: "Alanson B. Tyrell, after he had made the assignment of the policy in question to the plaintiff, placed the policy and the assignment and the receipt in an envelope, and sealed it, and inclosed it in a package, and delivered it to the plaintiff, and it has remained in her possession ever since, and further, that, at the time the papers in question were delivered to the plaintiff, she was not a creditor of the insured, nor a relative, nor connected by ties of blood or marriage, but only a friend of the insured."

The facts, as contained in this admission, were assumed to be all of the material facts bearing on the issue. From them it was inferred the plaintiff had no insurable interest in the life of Tyrell, and as he had, by the assignment and delivery

of the policy, relinquished control over it, it was, under the authority of the line of cases already noticed, held to be a wagering contract.

But do all the facts of which there was evidence, when taken together, warrant the conclusion that this plaintiff had no insurable interest in the life of Tyrell? If Tyrell, when she was <sup>14</sup> young, had taken this girl into his family, treated her as a member of it, reared and educated her, when she was of age had assisted her in getting remunerative employment, had watched over her and interested himself in her welfare, it could have been truthfully said he stood in the place of a parent to her; not by virtue of the legal relation of a child born to him in wedlock, or by adoption under our statute, but by his voluntary assumption of the paternal relation towards her with her consent. Without any legal obligation other than friend, he chose to assume all the burdens incident to this domestic relation of parent and child. His conduct and promises for years warranted her in believing the relation would continue while his life lasted. Having thus raised her from the humbler station in which he found her, he was continuing his kindness at the date the policy was assigned. For this offer, although rejected by the court as immaterial, must be taken as the fact. Plaintiff, among other facts, offers to prove: "That during the first two years of her acquaintance with the insured, she was a servant-girl in his house, he being a married man with a family, and about sixty years of age; that, about the time she quit his service, he told her that she ought to educate herself, so that she might be fit to earn a living by keeping books and typewriting; that he then told her if she would go to a business college at Wilkes-Barre he would pay her tuition; that she went to a business college, and was there several months, and studied book-keeping; that the insured paid her tuition there; that when she left the business college the insured purchased for her a desk and chair, and secured her desk-room in the office of Mr. Gunster, of Wilkes-Barre; that when in Mr. Gunster's office she kept the insured's time-book, the insured being a builder of coal-breakers and employing a large number of men; that for keeping said books the insured paid her at the rate of twenty dollars per month; that she left the office of Mr. Gunster in February, 1893, and came to Williamsport for the purpose of entering Pott's Commercial College, to learn shorthand-writing and typewriting; that the insured told her before she left

Wilkes-Barre that he would pay her tuition at said college; that she entered said college, and studied shorthand-writing and typewriting, and the insured paid her tuition; that after she came to Williamsport she received several letters from S. W. <sup>15</sup> Tyrell, the son of the insured, informing her of his father's sickness, and that she also received two letters in the mean time from the insured, stating the fact of his sickness, and inquiring how she was getting along; that in response to said letters she went to the home of her father and mother in the borough of Edwardsville, near the home of the insured, and while there the insured died."

As this case stood upon the record the plaintiff, as the assignee of the deceased, stood in his place, was his representative, so far as appears; she was making no claim adverse to the right of deceased or any representative of his right; the antagonist was the obligor in the policy; therefore, she was not incompetent under clause e, section 5 of act of 1887. Her competency as a witness against some other representative of the deceased assignor could not be properly raised in this issue between these parties. Therefore the offer was material, the witness was competent, and the facts offered to be proven must be taken as proven. The court below, in the opinion refusing to take off the nonsuit, treats these facts as proven, but considers them wholly immaterial. We think, having in view these facts, as well as those admitted of record, the plaintiff had an insurable interest in the life of the deceased. It does not matter that this interest was one without legal obligation on the part of the insured; it was a relation in every other respect parental; pecuniarily and otherwise he assumed a parent's part towards her, and she was justified in expecting the continuance of it. The question in *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570, was, as stated by this court, in these words: "Can one having no interest in the life of the insured, and for the purpose of speculation only, acquire by assignment or otherwise such title to the policy as the law will enforce" ?

In *Downey v. Hoffer*, 110 Pa. St. 109, this court assumes, with the court below, that the purchase by Downey was purely for a speculative purpose, and says: "The mischief resulting from a sale of the policy for purposes of speculating on human life is so contrary to the policy of the law, and so in conflict with the just principles of life insurance, that it is unsafe to relax the rule that the holder of the policy must

have some pecuniary interest in the life of the insured." And so with all the other cases cited by appellee where no recovery by the assignee <sup>16</sup> of a policy was permitted; in each the holder of the policy was interested in the death, rather than the life, of the insured, and the policy was speculative. In the case before us the plaintiff's interest was wholly in the life of the insured. From the facts the benefit to her from his fatherly care and pecuniary aid would, in a very few years, have far more than equaled the two thousand dollars policy assigned to her. From the severance of this relation by death she perhaps sustains a greater pecuniary loss than any of his children.

There may be an insurable interest not accompanied by kinship. Such interest implies a pecuniary interest present or prospective: Cook on Life Insurance, sec. 59. A moral obligation is sufficient to support it: *Ferguson v. Massachusetts M. Life Ins. Co.*, 32 Hun, 306. A creditor has an insurable interest in the life of his debtor who has been discharged in bankruptcy. Says May on Insurance, section 107: "The relationship seems to be of but little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doctrine of the latest of the Massachusetts cases before cited is broad enough to cover a case where there is no relationship at all, save one perhaps of mere friendship, if the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insurance." Here the plaintiff had nothing whatever to do with the procurement of the policy or its assignment; paid no part of the premium, and, so far as appears, never expected to pay any, for she was ignorant of its existence during the lifetime of the insured. She had substantial grounds for expecting decided pecuniary advantage from his life. Why then should the contract be termed speculative? Her expectancy, except in the one feature, the absence of legal obligation to enforce it, was as well founded as that of a wife or creditor.

If a voluntary copartnership gives to each partner an insurable interest in the lives of the others, if the relation of superintendent or manager of a business concern gives to his employers an insurable interest in the life of the superintendent or manager, as is well settled, then the voluntary relation here gave to this plaintiff an insurable interest in the life of one who, in all pecuniary respects, occupied towards her the

place of a parent, and the court below ought not to have held otherwise.

The judgment is reversed and a procedendo is awarded.

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**INSURANCE, LIFE.—INTEREST:** See the extended notes to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 786; *Morrell v. Trenton etc. Ins. Co.*, 57 Am. Dec. 93; *Lord v. Dall*, 7 Am. Dec. 42; *Continental etc. Ins. Co. v. Volger*, 46 Am. Rep. 190, and *Currier v. Continental etc. Ins. Co.*, 52 Am. Rep. 136. To support a contract of insurance on the life of one person in favor of another there must be a reasonable ground, founded on the relation of the parties, either pecuniary or of blood or affinity, to expect some relief or advantage from the continuance of the life of the insured: *United Brethren etc. Soc. v. McDonald*, 122 Pa. St. 324; 9 Am. St. Rep. 111, and note; *Keystone etc. Benefit Assn. v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572, and note. An interest to be insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction: *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463, and note.

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## GRAEFF v. PHILADELPHIA AND READING RAILROAD.

[161 PENNSYLVANIA STATE, 230.]

**A CARRIER OF PASSENGERS IS NOT BOUND TO PROTECT THEM FROM RASHNESS OR BAD MANNERS** on the part of strangers or other passengers not amounting to a breach of the peace.

**CARRIERS OF PASSENGERS.—IF AN IMPATIENT TRAVELER RUSHES HEN-LESSLY** and pushes the door of a railway car violently open, causing it to strike and injure a fellow-passenger, the carrier is not answerable for the damages thus sustained.

**A CARRIER OF PASSENGERS is not guilty of actionable negligence** because an injury occurs from a door being suddenly opened and pushed against one passenger by another, though, had the upper part been of glass, the passenger in fault would have seen and avoided injuring the other. Nor is such negligence inferable from the fact that a small screw eye on the inner surface of the door was at such a height that it struck the plaintiff in the eye and thereby inflicted a serious injury, if it was a usual and suitable appliance, and, but for the reckless act of a fellow-passenger in opening a door, would not have inflicted the injury.

*Gavin W. Hart*, for the appellant.

*William C. Gross and Thomas F. Gross*, for the appellee.

**232 GREEN, J.** The act which caused the plaintiff's injury was not the act of the defendant nor of any of its agents or employees. It was exclusively the act of a total stranger, over whom, or whose actions, the defendant had not the slightest control. Moreover, his action was not the usual customary conduct of an intending passenger about to pass through the door in question, but it was rude, impatient, and unusual. The plaintiff herself thus describes the manner

of her injury. Having said she was just about going out of the door, and had her hand up at the door, and her left foot on the pavement, she was asked: "Q. Where was the right foot? A. On the step, and going out there was a gentleman walked in or came running to make the train, and as he ran in he knocked the door against my head. Q. Where did he hit your head? A. He struck me right there on the forehead."

The plaintiff's witness, Emma Bettker, being the only other witness who described the manner of the injury, testified as follows upon the same subject: "As we were going out of the door Nora put her hands up to the door to go out, while two gentlemen came a rushing in and threw the door on Nora, and we were still going to pass out when there was a gentleman <sup>233</sup> coming from the depot says, 'Why, Miss, he has broke the skin; you had better go in.'" The foregoing is the whole of the testimony descriptive of the injury, except the plaintiff's cross-examination, which is substantially similar to the testimony in chief.

It is manifest, therefore, that the plaintiff's injury was exclusively the result of the unusual, rude, and hasty act of a stranger. Dealing with just such a question as this, in the case of *Ellinger v. Philadelphia etc. R. R. Co.*, 153 Pa. St. 215, 34 Am. St. Rep. 697, we held that a common carrier is not bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. A woman is not entitled to recover damages from a railroad company for personal injuries where it appears from her own testimony that when she was about to descend from the lower step of a car to the ground she was jostled off by another passenger rudely pushing by her to enter the car. Our brother Williams, delivering the opinion, said: "She had reached the lowest step, and was in the act of stepping from it to the platform, when an impatient man, desiring to take the train at that station, stepped up on the step she was leaving, and in so doing crowded or jostled her, and she fell. The immediate cause of her fall was the act of the impatient man in his efforts to get upon the car. . . . But protection against bad manners is not, so far as I am aware, one of the duties owing by a carrier to its passengers. Rudeness is a breach of no positive law. The ordinary cars are, and must be, open to the masses, among whom there will be different degrees of intelligence and politeness; differences in physical vigor and temperament. There

is therefore necessarily a certain amount of rudeness, of haste, of selfish disregard of the nerves and of the comfort of others to be met with wherever men and women congregate, whether upon railroad trains, in places of amusement, or upon the streets of a city. Unless such conduct amounts to a breach of the peace the officers of the law can take no cognizance of it, and carriers are not bound to prevent it, or liable in damages for its appearance about their stations or trains. The plaintiff was the victim of an act of rudeness."

All of this language is precisely applicable to the present **234** case. An impatient traveler, in a hurry to make a train, rushes ahead heedlessly, pushes the door open violently and causes the door to strike the plaintiff with force, and injures the plaintiff. It was an act of rudeness of which the plaintiff was the victim. That the stranger was responsible for his act there can be no doubt, but that the defendant shall be made to suffer in damages for such an act is intolerable and unjust to the last degree. It is subject to no duty to guard against such acts, and therefore is not negligent in that regard.

But, says the plaintiff, the defendant is negligent in the construction of the door, and therefore should be liable. A couple of carpenters are examined who, after the event, say the door was defective because it was not all glass above the middle rail, so that persons could see each other coming to the door. It is not at all certain that the same accident would have been avoided if this door had been built in that way, because the same spirit of impatience and rudeness would have prompted the same act of haste in opening the door to get through quickly, although another person was visible on the other side. But the best illustration of the fallacy of the attempt to establish negligence in this way is afforded by one of our own cases: *Hayman v. Pennsylvania R. R. Co.*, 118 Pa. St. 508. There the door for the transit of the passengers from the wharf to the boat was constructed precisely as the carpenters said this one should have been, viz: all glass above the middle rail. But it happened that a passenger going through it just behind another passenger, put up his hand to push it open, and he struck the glass with force enough to break it, and his hand having been cut severely by the broken glass, he brought an action against the company, and sought to recover upon the presumption of negligence arising from the mere fact of the accident. But we refused to sanction that proposition, and held that the door was no part of the



machinery used for the carriage of passengers, and that the plaintiff, in order to recover, must prove negligence affirmatively. In that case the accident resulted from the presence of too much glass in the door, and in this case it was contended there was too little. But both contentions were untenable. The doors were both such as are in common use, and the mere construction of neither of them justified an inference of negligence. The present case is much stronger than the Hayman case, because in that the injury was the result of the mere ordinary use of the door, while here it was the result of the violent act of a stranger.

Again, it is contended that the presence of a small screw eye on the inner surface of the door was the immediate means by which the injury was inflicted, and therefore it was negligence to have it in a position where it could strike the plaintiff's head. There was no proof that such an appliance was not a usual and suitable device for holding the door open when the weather did not require it to be closed, but it was contended it should have been at the top or the bottom of the door so that it could not have hurt the plaintiff. It was a very small screw eye, and only projected nine-sixteenths of an inch beyond the surface. It was located four feet and ten inches from the bottom of the door, and it happened that the plaintiff was of a sufficiently short stature to bring her head on the level with this little appliance. It is a sufficient reply to the argument derived from this source to say that if the eye had been at the bottom of the door it might have struck her ankle and injured her, as was the fact in the case of *Kies v. Erie City*, 135 Pa. St. 144, 20 Am. St. Rep. 867. There the plaintiff, who was a woman also, was passing along the street in front of an engine-house, when the door, which projected when open six feet over the pavement, was suddenly thrown open and struck the plaintiff on the ankle and injured her seriously. She brought an action against the city for the injury, but the court below granted a nonsuit which this court sustained. It was claimed that the building was negligently constructed as to the doors, and therefore the city was liable, but we held otherwise. Mr. Chief Justice Paxson said in the opinion: "It is true the doors of the engine-house opened outwards, and were operated by springs, which, when certain bolts were pulled, opened, or assisted in opening the doors. The case was argued upon the theory that when the bolts were pulled the springs opened the doors suddenly and

with great violence. In such case, as they swept across a considerable portion of the pavement in opening, it can readily be seen that they might be a dangerous trap to injure persons passing along the said pavement. The only testimony on the part of the plaintiff upon this subject was substantially as follows: 'When the bolts are pulled you have to start the doors a little bit, and then the <sup>236</sup> spring takes bolt, and helps swing the door open. Sometimes they are opened quick and sometimes not so quick. If the wind is blowing it is difficult, and you have to follow the door and push it along; and when there is no wind they swing freely.' As the plaintiff was nonsuited she is entitled to all the deductions which can fairly be drawn from this evidence. Tested by this rule, however, it is not sufficient to justify a jury in finding that the doors of the engine-house were defectively constructed, and dangerous to citizens using the pavement. It is evident that the only object and effect of the springs was to aid the firemen in swinging open the heavy doors. It is not only possible, but probable, that on the occasion referred to, if the door was opened rapidly and violently, as contended by the plaintiff, it was the result of a push by the person who opened it. For his carelessness or negligence the city, under all the authorities, is not liable, and we have already said there was not sufficient evidence of the faulty construction of the building to submit to the jury."

Just so in the present case. The defendant is not responsible for the act of the stranger in pushing open the door in a rude and violent manner. If it had been opened in the ordinary and usual manner the plaintiff would not have been hurt. But the defendant is not bound to take precautions against the unusual and negligent use of its appliances by strangers or others. If they are reasonably safe when used with ordinary care, and in the manner that prevails with the mass of mankind, the duty of the party who supplies them is performed.

A very apt illustration of this doctrine is found in the case of *Eisenbrey v. Pennsylvania Co.*, 141 Pa. St. 566. There a fence was erected inclosing the front steps of a residence, and having a door therein extending, when wide open, ten inches beyond the limit within which obstructions were permitted by a city ordinance. The plaintiff, an old man sixty-nine years of age, was passing along the foot-walk in front of the house, when suddenly the door or gate in the fence was

thrown open, and struck him, causing him to fall and suffer a fracture of his thigh. A verdict was recovered in the court below, but we reversed the judgment without a venire. We said: "The accident did not result from the erection of the fence. That was harmless enough, and if in violation of the city ordinance, which does <sup>237</sup> not clearly appear, was not necessarily dangerous or likely to injure any one. The proximate cause of the injury to the plaintiff was the throwing open of the door suddenly. It was not contended that this was done by the company or by any agent, employee, or servant thereof. There is no room, therefore, to apply the doctrine of *respondeat superior*."

All of this is exactly pertinent to the present contention. For the rude and hasty act of the stranger the defendant is not responsible.

The screw eye was a perfectly proper appliance to be upon the door to fasten it back. In itself it was entirely innocent, and was not by any means so prominent as the knob of a door, or an outside lock, or a key projecting therefrom. In all the ordinary use of the door there was not the least liability to inflict injury resulting from its presence. It is not possible to regard it as any more, nor even as much, a source of danger, as a projecting knob, or lock, or key, or even a piece of carving or an old-fashioned knocker. We are perfectly clear that the mere presence of such an appliance on the surface of a door is not the least evidence of negligence in the construction of the door, and the same is true of the glass plate.

Upon the whole testimony we are of opinion that the case should have been withdrawn from the jury with a binding instruction to find a verdict for the defendant. We sustain the fifth, sixth, seventh, and eighth assignments of error. The others are immaterial.

Judgment reversed.

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**RAILROADS—DUTY TO PROTECT PASSENGER FROM THE VIOLENCE OF FELLOW-PASSENGERS.**—A railroad is not liable for injuries to a passenger resulting from her being jostled and pushed by an impatient man, not an employee of the company, trying to enter the car from which she was alighting: *Ellinger v. Philadelphia etc. R. R.*, 153 Pa. St. 213; 34 Am. St. Rep. 697, and note. A common carrier must protect his passengers against the violence and insults of strangers and copassengers: *Richmond etc. R. R. Co. v. Jefferson*, 89 Ga. 554; 32 Am. St. Rep. 87, and extended note: *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588; 29 Am. St. Rep. 827, and note. See, also, the extended note to *Rommel v. Schambacher*, 6 Am. St. Rep. 735.

## WILLIAMS v. LADEW.

[161 PENNSYLVANIA STATE, 282.]

**WATERS.**—AN INJURY TO A SUBTERRANEAN SUPPLY OF WATER by lawful acts of an adjacent landowner done upon his own premises is, unless the stream is well defined and its existence known or easily discernible, or unless the injury is caused by malice, *damnum absque injuria*.

SUIT to restrain the construction of a tunnel. In 1869 a tunnel was constructed in plaintiffs' land through which a considerable stream of water began to flow. The sources of this stream were sundry unknown underground currents, intersected and collected by the tunnel. Afterwards the defendants applied for and received a permit from the borough of Everett to dig a tunnel under West street to carry water to their tannery. The complainants in their bill alleged the object of the new tunnel to be the intersection of the tunnel already constructed by them, and the diversion of the waters flowing in their tunnel and the causing them to flow through the new tunnel upon certain lands to the tannery of the defendants. The trial court issued a preliminary injunction to be in force until the final hearing.

*Alexander King*, for the appellants.

*Harvey C. Williams, Kerr & McNamara, Frank Fletcher, and James S. Williams*, for the appellees.

286 DEAN, J. In the year 1893 the defendants, who operate a large tannery near Everett, Bedford county, began the construction of a tunnel upon their own land to procure a supply of water for their tanning operations. The plaintiffs thereupon filed this bill, averring that they are informed and believe that the object 287 of defendants in constructing the new tunnel is to intersect a water-way tunnel upon their land, and to divert the water from this last-mentioned tunnel to defendants' use, to the damage of plaintiffs, and praying for an injunction to restrain the defendants from further work upon the tunnel upon their own land. The court below granted a temporary injunction, which, upon hearing, it refused to dissolve, thus restraining defendants from further work, until final hearing and decree. This appeal is from the refusal to dissolve the preliminary injunction.

For obvious reasons, on this appeal from an interlocutory decree, it would be improper for us to express any opinion on the disputed facts in the issue. But taking the undisputed

facts as they appear by bill, answer, and affidavits, defendants as yet have not touched, and do not intend, in the construction of their tunnel, to touch, other than their own lands. The procuring of a water supply is absolutely necessary to the existence of their tannery business, in which they have invested a very large amount of money. The averments in the bill and in plaintiffs' affidavits, at best, show an apprehension that defendants' purpose is to unlawfully divert water to which plaintiffs claim the exclusive right; for they do not aver a belief that defendants intend any excavation outside their own land.

Under such a state of facts we think plaintiffs' right to an injunction, pending hearing, was very doubtful, because plaintiffs' right to restrain defendants' operations on their own land is far from clear. The strong arm of an injunction should not be exercised unless in cases of clear right or great wrong, without remedy at law.

True, the plaintiffs aver the construction of this tunnel upon defendants' own land will tap subterranean streams, which now flow into plaintiffs' tunnel. But it does not necessarily follow that even this would violate a right of plaintiffs'. In *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542, a case in which Lybe prayed for an injunction to restrain one Herr from digging a well upon his own land, whereby a subterranean flow of water would be cut off from a certain spring to which plaintiff had a right, there was a most thorough examination of the whole subject, and a review of the law in this state and in England, it was decided: "That the owner of land is not entitled to recover for injuries to wells <sup>288</sup> and springs situated thereon if caused by the acts of the adjoining owner, if done in the exercise of his lawful rights on his own soil, and if such rights are exercised without malice or negligence." It is further held that as to subterranean waters, "The great preponderance of authority supports the doctrine that an injury caused to a subterranean supply of water by the lawful acts of an owner of land is, unless the stream be well defined and its existence known or easily discernible, or unless the injury be caused by negligence or malice, *damnum absque injuria*." It is said in this case that the question was first discussed at length in *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721. In the case last named it appeared that Baugh, the plaintiff, occupied about an acre of ground, on which he carried on a tannery; he procured his

supply of water for tannery purposes from a spring upon his own land. The defendant, for the purpose of mining copper ore upon the land adjoining, at the distance of five hundred and fifty yards from Baugh's spring, sank a shaft, which, while operated, stopped the subterranean flow into the spring. This court decided against the plaintiff, on the ground that the source of the spring was percolations, and the interruption of these was no cause of action. But the court says: "We have treated the stream as depending on percolations alone at the point where mining operations are carried on, because the evidence does not show that any distinct watercourse leading to it has been cut off. If this should be shown, and it should also appear that it could have been preserved without material detriment to the owner of the land through which it flowed, the destruction of it might be attributed to to malice or negligence."

In *Haldeman v. Bruckhart*, 45 Pa. St. 514, 84 Am. Dec. 511, it is decided: "That a proprietor of land may, in the proper use of his land for mining, quarrying, building, or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor, without any responsibility to that neighbor." We have called attention to the law as stated in these cases, because counsel for both parties cite and rely on these cases.

The plaintiffs aver that defendants' construction of a tunnel on their own land will tap subterranean waters under that land, which now run into a defined stream on plaintiffs' land. But this stream, in the most favorable view, is no better defined than Lybe's spring, in the case cited, the subterranean flow to <sup>289</sup> which was cut off. Besides, it is disputed that the stream on plaintiffs' land is such a natural stream, the flow of which cannot be lawfully diminished by them as adjoining owners; but putting aside this question, the defendants have the right to construct a tunnel upon their own land to obtain a water supply from percolations or subterranean flow upon that land, so long as their operations are not negligently or maliciously conducted; or, if defendants attempt to interfere directly with the body of water in the stream on plaintiffs' land, before the determination of their right, the court may properly, on application, restrain such interference. But so long as their operations are confined for a useful purpose to their own land we think at this stage of the case they should not be restrained by injunction.

Therefore, the decree of the court below continuing the injunction is reversed at the costs of the appellees, and the injunction is dissolved, so far as it restrains defendants from necessary and useful operations on their own land.

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**WATERS—SUBTERRANEAN—INJURY TO—DAMNUM ABSQUE INJURIA.**—In the enjoyment of his lands the owner may cut drains or mine or quarry, though in so doing he interferes with the flowage of water in hidden, unknown, or underground channels: *Peoples' Gas Co. v. Tyner*, 131 Ind. 277; 31 Am. St. Rep. 433, and note, with the cases collected. See on this subject the extended note to *Wheatley v. Baugh*, 64 Am. Dec. 728.

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## NESTER v. CONTINENTAL BREWING COMPANY.

[161 PENNSYLVANIA STATE, 473.]

**TRADE, CONTRACT IN RESTRAINT OF.**—An association or combination of individuals, the object of which is to enable its members to regulate and control the price of beer in a designated city and county, is in unlawful restraint of trade.

**CONTRACT IN RESTRAINT OF TRADE, THOUGH PARTIAL AND CONFINED IN ITS OPERATION** to a designated city and county, is unlawful if injurious to the public interests, as where it provides that the signers will not sell an article of prime necessity, or even of frequent use, in such city and county, or to be used therein to persons other than such signers except at a price therein specified.

**CONTRACT IN RESTRAINT OF TRADE IS NOT RENDERED LAWFUL** by the fact that the articles affected by it are not necessities of life. Hence, a pool or combination to control the price of beer in a city and county is unlawful.

**CONTRACT IN RESTRAINT OF TRADE.**—EQUITY WILL NOT COMPEL AN ASSOCIATION, formed for the purpose of restraining trade by controlling the price of an article and preventing its sale except at a price agreed upon, to pay to one of its members his share of the profits or moneys realized by it if the complainant requires the aid of the illegal contract or transaction to establish his cause.

**EQUITY WILL NOT ASSIST A COMPLAINANT WHOSE CAUSE OF ACTION RESTS UPON A TRANSGRESSION OF THE LAWS** of his country, though the defendant has realized and retains profits resulting from the forbidden transaction in which both participated under an agreement to share the profits thereof.

**ASSIGNMENT.**—AN ASSIGNEE CANNOT ENFORCE A CAUSE OF ACTION which his assignor would not have been permitted to enforce, because it was founded upon a contract unlawful as in restraint of trade where notice of the character of the contract and combination was in the channel of the assignee's title.

Suit in equity for an accounting. The bill alleged that the defendants, all of whom, except one, were brewers in Phila-



Philadelphia, formed an association called "The Brewers' Association of Philadelphia"; that the plaintiff's assignor, the Enterprise Brewing Company, was a member of the association; that, according to statements of account rendered monthly by the association, it appeared that from July, 1886, to the 1st of January of the following year, the sum of fourteen thousand four hundred and thirty-five dollars and seventy-seven cents became due from the association to the assignor; that such assignor, for a valuable consideration, had executed to the plaintiff an assignment in writing of the amount thus due; that by further statements it appeared that from January 1, 1887, to June of the same year, the further sum of three thousand three hundred and eighty-seven dollars and thirteen cents became due from the association. The agreement of association was in writing, and provided that the signers "hereby stipulate and bind themselves one to the other and do hereby agree one with the other not to sell and deliver any beer in the city and county of Philadelphia, and Camden, and Camden county, New Jersey, or which is to be used in the city and county of Philadelphia, Camden, or Camden county, New Jersey, after July 1, 1886, to any new trade or any other brewers' customer or customers that belong to the association during the continuance of this agreement, at less than eight dollars a barrel." Severe penalties for the violation of the agreement were provided for in it, and there was a further article authorizing the board of trustees to call the association together "from time to time, and at any such meeting the price at which beer may be sold may be changed by a vote of not less than two-thirds of all the members belonging to said association at the time of voting thereon." The trial court sustained the demurrers to the complaint and dismissed the bill.

*John O. Bowman, Theodore P. Matthews, and Furman Sheppard*, for the appellants.

*John Dolman, S. G. Thompson, Henry P. Brown, John K. Valentine, and Joseph L. Tull*, for the appellees.

480 STERRETT, C. J. The conclusions of fact found by the learned court below were amply justified by the record. "It cannot be gainsaid that the object of this combination is to enable the forty-five brewers of Philadelphia, individuals, firms, and corporations, who have entered into it, to regulate

and control the sale and price of beer within the city of Philadelphia and the county of Camden, New Jersey. It certainly is a combination in restraint of <sup>481</sup> trade, tending to destroy competition and create a monopoly in an article of daily consumption."

The appellants, however, conceding these to be the facts, insist that the contract was not within the prohibition of public policy because the restraint was but partial. Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But, in the present case, there is no purchase or sale of any business, nor any other analogous circumstances giving to one party a just right to be protected against competition from the other. All the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists": *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216.

The test question in every case like the present is whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious.

So it is obviously immaterial whether the restraint be general or partial. The application of the rule does not depend upon the number of those who may be implicated, nor the extent of space included, in the combination, but upon the existence of injury to the public. One combination, consisting of but part of those engaged in a given branch of trade, may amount to a practical monopoly; while another, less extensive in its scope, may as well bring disaster in its train. The difference lies only in degree, but equally forbids the aid of courts. In *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, where a combination had been formed among some of the stenographers in the city of Chicago, Mr. Justice Baily said: "True, the restraint is not so far reaching as it would

have been if all the stenographers in the city had joined the association; but, so far as it goes, it is of <sup>452</sup> precisely the same character, produces the same results, and is subject to the same legal objection. . . . We can see no legal difference between the restraint on competition which it now exercises, and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of stenographic reporters." So no one can for a moment doubt that more serious injury would result to densely settled than to a much larger district with scattered population. Thus a combination to raise the price of breadstuffs would cause serious loss in a city, while it would be comparatively harmless in an agricultural state. "We can scarcely conceive," said Mr. Justice Marr, in *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 29 Am. St. Rep. 690, "how mere territorial limits can be the controlling test in all instances of the legality of the restraints imposed upon the ordinary course of trade. The criterion may do very well when applied to the occupation or profession of one man or even a few individuals; for neither their labor, industry, business, nor services may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade in articles of prime necessity, or even of very frequent use, among a large number of persons in a given locality": *Hooker v. Vandewater*, 4 Denio, 849; 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 282; *Moss v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216; *Hilton v. Eckertley*, 6 El. & B. 66; *India Baggage Assn. v. Koch*, 14 La. Ann. 164; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, and *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; 8 Am. Rep. 159, were all cases—and they show the trend of decisions in this country—in which combinations in restraint of trade were partial in respect of the number of persons implicated and territorial limits, and were yet held injurious to the public interests, and therefore void as against public policy. The true test was the effect upon public interests.

So, if the natural tendency of such contracts is to injuriously affect public interests, the form and declared purpose are immaterial. Courts will not lend their aid in illegal transactions, no matter how disguised. Thus, where a contract, entered into by the grain-dealers of a town, which, on its face, indicated that they had formed a partnership for the

purpose of dealing in grain, but the true object of which was to form a secret combination <sup>492</sup> which should stifle all competition and enable the parties to control prices, was held void on the ground of public policy: *Craft v. McConoughy*, 79 Ill. 346; 22 Am. Rep. 171; *India Baggage Assn. v. Koch*, 14 La. Ann. 164, is to the same effect.

The appellants insist that restraint of trade in the necessities of life only is within the prohibition of public policy. No standard has been furnished by which to ascertain what constitute these with reference to the general public. But, assuming that beer is not among them, it is equally within the reach of the rule. The law recognizes it as a commodity, regulates its sale, it is "an article of daily consumption," and the court should refuse to aid in any attempted imposition upon the public by means of illegal combinations. The fact that coal was "an article of prime necessity" was not mentioned as essential to the illegality of the combination which was involved in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159, but was suggested, *arguendo*, as an aggravation of the injury done the public. The whole course of discussion there shows that injury to the public was regarded as the true test of illegality.

Appellants also insist that "equity will not permit the fund accumulated here to be locked up forever, or dishonestly appropriated by defendants," but will compel a settlement, according to good conscience, even with a partner in an illegal transaction, *a fortiori* with an assignee wholly innocent of participation in or knowledge of the alleged illegalities.

"The test, however," as was well said by the learned judge below, "is whether the plaintiff requires the aid of the illegal transaction to establish his case; if the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him: *Swan v. Scott*, 11 Serg. & R. 164; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; 8 Am. Rep. 159." "The objection," said Lord Mansfield in *Holman v. Johnson*, Cowp. 343, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff—by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court

will lend its aid to a man who founds his cause of action <sup>484</sup> upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of the law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would have the advantage of it, for where both are equally at fault, *potior est conditio defendentis*." As the bill here bears upon its face the evidence of the turpitude of the transaction out of which the plaintiffs' demand arises, it is plain upon this principle that the court must have refused its aid had the Enterprise Brewing Company itself been the beneficial claimant; and its assignees stand in no higher right. Notice of the character of the combination was in the channel of the assignees' title, and hence they are not "innocent of participation in, or knowledge of, the illegality" of the combination, and must be treated as having taken subject to the disabilities of their assignor: *Chamberlain v. Barnes*, 26 Barb. 160; *Riddle v. Hall*, 99 Pa. St. 116. It follows that there is no error in the decree, and it should be affirmed.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

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**COMBINATIONS IN RESTRAINT OF TRADE.**—All combinations, whether of capitalists or workmen, for the purpose of influencing trade in their special favor, by raising or reducing prices, are illegal, and such agreements will not be enforced by the courts: *More v. Bennett*, 140 Ill. 69; 33 Am. St. Rep. 216, and note; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510; 31 Am. St. Rep. 242, and note. Combinations of individuals formed for the purpose of stifling competition in trade are against public policy and void: *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690, and note. See further on this subject, *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; 40 Am. St. Rep. 319, and note, and the note to *People v. North River etc. Refining Co.*, 18 Am. St. Rep. 873.

**CONTRACTS IN RESTRAINT OF TRADE VOID AS AGAINST PUBLIC POLICY.** Though the restraint of trade imposed by contract is but partial, it will not be enforced if it is unreasonably injurious and oppressive to the public: *Chicago Gas etc. Co. v. People's Gas etc. Co.*, 121 Ill. 530; 2 Am. St. Rep. 124, and note; *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690, and note. See, also, the cases and notes on this subject collected in the note to *Chapin v. Brown*, 32 Am. St. Rep. 301.

**CONTRACTS IN RESTRAINT OF TRADE—NECESSARIES.**—A contract to avoid competition and regulate prices, where the article to be sold is not of prime necessity nor a staple commodity, is not in restraint of trade: *Gloucester Fisheries etc. Co. v. Russia Cement Co.*, 154 Mass. 92; 26 Am. St. Rep. 214.

**EQUITY—ENFORCEMENT OF ILLEGAL CONTRACTS.**—Parties to an illegal agreement stand *in pari delicto*, and neither can enforce the agreement against the other: *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330; 35 Am. St. Rep. 713, and note; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note. Courts will not enforce the execution of an illegal contract: *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459, and note; *Lery v. Spencer*, 18 Col. 532; 36 Am. St. Rep. 303, and note; *Rowman v. Phillips*, 41 Kan. 364; 13 Am. St. Rep. 292; *Leonard v. Poole*, 114 N. Y. 371; 11 Am. St. Rep. 667, and note. See the extended notes to *Woods v. Armstrong*, 25 Am. Rep. 674, and *De Leon v. Trevino*, 30 Am. Rep. 406.

**ASSIGNMENT—RIGHTS OF ASSIGNEE.**—Each successive assignee of a claim in action takes it subject to the equities existing between the original assignor and his immediate assignee: *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331, and note. A party entitled to a share or the whole of a recognizance cannot assign it so as to defeat any legal or equitable defense to which it was subject in the hands of the assignor: *Burton v. Wilkin*, 6 Houst. 522; 22 Am. St. Rep. 263.

## HAGUE v. HAGUE.

[161 PENNSYLVANIA STATE, 643.]

**A CONVEYANCE OR DEVISE TO SARAH H. AND HER CHILDREN** vests in her a life estate with a remainder in fee to her children as a class. Her after-born children are entitled to participate in the benefits of such devise or conveyance.

*W. G. Guiler*, for the appellants.

*Samuel Ewing*, for the appellee.

645 **GREEN, J.** Although the grantees in the deed are designated as "Sarah Jane Hague and her children," which, if the children were strangers, would constitute them all tenants in common, it must be admitted that the weight of authority holds the mother to be only a tenant for life. *Shirlock v. Shirlock*, 5 Pa. St. 367, which held the mother and children to be tenants in common, has never been followed, and has been several times questioned and departed from in subsequent cases, and cannot now be regarded as authority.

In *Coursey v. Davis*, 46 Pa. St. 25, 84 Am. Dec. 519, the subject was fully considered 646 in an elaborate and exhaustive opinion by Mr. Justice Read, in which the ruling in *Shirlock v. Shirlock*, 5 Pa. St. 367, was distinctly repudiated. The

words of the grant in *Coursey v. Davis*, 46 Pa. St. 25, 84 Am. Dec. 519, were, "to the said Mildred Ann Davis and her children exclusively, and their heirs and assigns, to have and to hold the premises to the said Mildred Ann Davis and to her children exclusively, and their heirs and assigns," and we held that these words vested in Mildred Ann Davis a life estate only, with remainder in fee to her children as a class, so that those in being at the date of the deed, as well as those subsequently born, would be entitled to take in the distribution, on the termination of the life estate at her death. We can see no material difference between the words of the grant in that case and in this.

In *White v. Williamson*, 2 Grant Cas. 249, we held that a deed to A "for the use of the wife and children of B," conveys a life estate to the wife of B with remainder to her children; and the children take as a class, and not individually, embracing children *in esse* and those thereafter born. Mr. Justice Strong, in the course of the opinion, referring to the declaration of trust, said: "Under that declaration, what interest did she take? Was it a life estate, with remainder to her children, or was it a tenancy in common with them? The court below thought it was the former, and so instructed the jury. We incline to concur in that opinion. Under that declaration the children take as a class, not individually. The grant is not to the children then *in esse*, but it embraced those after born. It was the gift of a father for the benefit of his descendants. If the time of the distribution was the date of the gift, then after-born children must have been excluded; for where a gift is to a class, the rule is that the time of distribution defines the individuals who constitute the class."

In *Wolford v. Morgenthal*, 91 Pa. St. 30, the words of the grant were to trustees named, "in trust for the use and benefit of Margaret Morgenthal and her heirs forever, that is the children, if any, begotten by Frederick Morgenthal; and her daughter, Elizabeth Wire, is to be made equal, to be for them and their heirs forever, after the decease of Frederick Morgenthal, her present husband." Elizabeth Wire was a daughter of Margaret by a former marriage. Mr. Justice Mercur, delivering <sup>647</sup> the opinion, said: "The same estate vested in Elizabeth as if she had been begotten in lawful wedlock by Frederick upon the body of Margaret. It therefore follows that the word "children" is not a word of limitation, but a word of purchase: *Melsheimer v. Gross*, 58 Pa. St. 412. What, then,



is the estate taken by Margaret, and by the children respectively, including Elizabeth? The answer is, the mother took a life estate with remainder in fee to the children as a class. It was a vested remainder in fee in Elizabeth, who was living at the time of the execution of the deed, and opened to let in the after-born children as their births respectively took place": Citing many authorities. In *Coursey v. Davis*, 46 Pa. St. 25, 84 Am. Dec. 519, also, we decided that after-born children were let in until the death of the mother.

It will be perceived that in all the foregoing cases it was held that the mother took only an estate for life, and that the children took the fee. And, in determining what children were embraced in these several grants, we held, in all, that the time of distribution was the death of the mother, and that all after-born children up to that time were entitled to participate.

The same rule was held in *Haskins v. Tate*, 25 Pa. St. 249, where a testator devised as follows: "I further will that the plantation I bought of my son Robert, lying near Hills Mill, shall be equally divided amongst my son Robert's children, he and them enjoying the benefits of it whilst he lives." We held that children born after the death of testator, and living at the death of Robert, participated equally with those born before. Lowrie, J., said: "We think this case falls within the rule that on a limitation to a class, which may include persons not yet born, the time of the distribution defines the members that are to constitute the class."

To the same effect is *Gernet v. Lynn*, 31 Pa. St. 94.

The foregoing authorities indicate clearly that the decree recommended by the master, and adopted by the court below, was entirely correct, and must be affirmed.

Decree affirmed and appeal dismissed at the cost of the appellants.

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**CONVEYANCE TO WOMAN AND HER CHILDREN — ESTATE GRANTED. —** A conveyance to a married woman and the heirs of her body by a specified husband, from whom the consideration moves, passes only a life estate to the woman herself, but her children, whether born before or after the execution of the deed, take a vested estate in the remainder: *Fletcher v. Tyler*, 9 Ky. 145; 36 Am. St. Rep. 584, and note. A deed to a woman and her children begotten by a specified husband, forever, conveys a life estate to the wife with a remainder to her children begotten by the designated husband: *Udine v. Arthur*, 91 Ky. 53; 34 Am. St. Rep. 162. Under a devise by a husband to his wife and children the wife takes a life estate only, unless there is some other provision in the will showing a contrary intent: *Waser v*

*Wearer*, 92 Ky. 491; 36 Am. St. Rep. 604. See the notes to *Larsen v. Johnson*, 23 Am. St. Rep. 409, 410, and *Carpenter v. Van Olinder*, 11 Am. St. Rep. 99-107, where this subject is thoroughly discussed. See, also, the recent case of *Taylor v. Bell*, 158 Pa. St. 651; 38 Am. St. Rep. 857, and note.

**ESTATES—RIGHTS OF AFTER-BORN CHILDREN.**—For instances in which it was held that the estate in remainder would open and let in persons born after the testator's death, see the note to *Kent v. Church of St. Michael*, 32 Am. St. Rep. 699, where the cases are collected.



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1. WHO MAY APPEAL.—Under a statute giving the right of appeal to any person aggrieved by a probate decree the only persons who may exercise such right are those who have rights which may be enforced at law and whose pecuniary interest may be established in whole or in part by the decree. *Briard v. Goodale*, 523.
2. An appeal by a sister from a probate decree appointing a guardian for her sister as a person of unsound mind, which neither specifies any reason for the appeal nor alleges in the exceptions that the appellant is an heir apparent or an heir presumptive of the ward, and which fails to show affirmatively that the appellant is legally interested in the ward's estate, should be dismissed. *Briard v. Goodale*, 526.
3. APPEAL PENDING MOTION FOR NEW TRIAL.—The pendency of a motion for a new trial at the time an appeal is taken does not in any manner invalidate the appeal nor prevent the appellate court from giving the same consideration to errors properly raised by it as it might do had no motion been filed. *Hunt v. Iowa Cent. Ry. Co.*, 473.
4. ADVERSE PARTY, WHO IS.—Every party whose interest in relation to the judgment or decree appealed from is in conflict with the reversal or modification sought by the appeal, is an adverse party, and must be served with a notice of appeal under a statute requiring the appellant to serve such notice on the adverse party. The notice must be served on all persons whose interests are adverse to the party appealing. *The Victorian*, 838.
5. ADVERSE PARTIES WHO ARE NOT.—Persons who are affected by a judgment to the same extent as the appellant, and who would be equally benefited with him by a reversal or modification thereof, are not adverse parties, and therefore he need not serve them with the notice of his appeal. Therefore, if a judgment is against a defendant and his sureties, he may appeal therefrom without serving them with his notice of appeal, or otherwise making them parties to the appellate proceeding. *The Victorian*, 838.
6. ALL ERRORS OF LAW arising upon a trial to which proper and timely exceptions are taken may be reviewed on appeal without having been embodied in a motion for a new trial. *Hunt v. Iowa Cent. Ry. Co.*, 473.
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8. VERITY OF RECORD.—The circuit court is charged with the duty of making up its own record, and its action in this respect, and its determination as to what transpired in court, cannot be questioned for alleged want of conformity with the truth, either on *mandamus* or appeal. *Estate of Kessler*, 74.

9. **PRACTICE—ERRONEOUS ORDER OF COURT**—Mere errors in making interlocutory orders will, in general, furnish no justification for disobedience thereto if they do not subject the party to the payment of money or imprisonment. If the party against whom such order is made wishes to contest its validity or propriety he may refuse to obey, and in the further proceedings for contempt may show in defense that the court had no authority to make the order, and if his defense is disallowed and judgment is entered against him for a sum of money by way of fine, enforceable by execution or imprisonment, an appeal in his favor will lie. *Lester v. People*, 375.
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16. **JURY TRIAL—PRACTICE—MISCONDUCT OF THE COURT IN IMPANELING A JURY** is a matter of exception, and, unless saved by the exception, cannot be considered on appeal. *City of Tarkio v. Cook*, 678.
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- 20. REHEARING—EFFECT OF FILING PETITION FOR.**—The filing of a petition for a rehearing can, under the rules of the supreme court, have no greater effect than to stay the execution of the judgment pending the petition. An order overruling the petition will leave the judgment in full force as of the date of its rendition. *Lester v. State*, 375.

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- 2. CRIMINAL LAW—EVIDENCE—FOOTPRINTS.**—On the trial of a person for arson evidence of footprints near the burned building and their correspondence with the defendant's feet is admissible with other proof, as tending to make out a case, though not by itself of any independent strength. *Carlton v. People*, 346.

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2. **NOTICE TO ATTORNEY, WHEN DUE NOTICE TO HIS CLIENT.**—It is the duty of an attorney at law or other agent to communicate to his client whatever information he acquires in relation to the subject matter involved in the transaction; and he will be conclusively presumed to have performed this duty, and notice to him is therefore conclusive notice to his client or principal. *Wittenbrock v. Parker*, 172.

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3. **PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY TO SELL REAL PROPERTY, DAMAGES FOR.**—If the owner of real property appoints an agent to sell it, and agrees that he shall have a specified compensation for making sales, and further, that, if he sell the whole within a year, he shall be entitled to an additional compensation there is an implied agreement that he shall have a year in which to make the sales authorized, and he may recover the damages sustained from the revocation of his agency before the expiration of the year. *Glover v. Henderson*, 695.
4. **PRINCIPAL AND AGENT—DAMAGES, MEASURE OF FOR REVOCATION OF AGENCY.**—If the authority of an agent to sell specified real property is wrongfully revoked after he has performed services and made expenditures in good faith under it, the measure of his damages is the reason-

able value of the services rendered, and the money fairly expended in performing such services. *Glover v. Henderson*, 695.

5. **EVIDENCE—VALUE OF SERVICES.**—In an action by an agent to recover the value of his services under an authorization to sell certain real property, which authorization was wrongfully revoked by his principal, evidence tending to prove what is usually charged for such services, and what, in the opinion of competent witnesses, such services were worth, is admissible. *Glover v. Henderson*, 695.

See AGENCY, 7.

### BUILDING CONTRACTS.

See SPECIFIC PERFORMANCE, 3

### BURDEN OF PROOF.

See CONTRACTS, 5; CRIMINAL LAW, 4; NEGLIGENCE, 11; NOTICE, 1; RELEASE.

### CANDIDATES.

See LIBEL, 5, 8, 9.

### CARRIERS.

1. **COMMON CARRIERS ARE OBLIGED** by the common law to receive and carry all goods offered for transportation upon receiving a reasonable hire; and the courts are competent to ascertain and determine what hire is reasonable. *Chicago etc. R. R. Co. v. Jones*, 278.
2. **LIMITATIONS UPON LIABILITY—RECEIPT AS CONTRACT OF SHIPMENT.**—A receipt for goods given by a common carrier, with an unsigned contract to carry upon certain conditions printed on the back thereof, and stating that a bill of lading is to be given thereafter, does not constitute a special contract of shipment limiting the carrier's liability. *Merchants' etc. Transport. Co. v. Furthmann*, 265.
3. **LIMITATION OF LIABILITY BY NOTICE.**—The common-law liability of common carriers cannot be restricted by notice whether brought home to the shipper or not. *Merchants' etc. Transport. Co. v. Furthmann*, 265.
4. **LIMITATION UPON LIABILITY—BILLS OF LADING.**—When goods are shipped under a verbal agreement before any written contract or bill of lading has been tendered to the shipper, the subsequent acceptance of a bill of lading without assenting to its conditions does not preclude the shipper from showing what the actual agreement was, in an action to recover for a loss. *Merchants' etc. Transport. Co. v. Furthmann*, 265.
5. **CARRIERS OF LIVESTOCK—EXEMPTION CONTRACT.**—A contract for the transportation of livestock by a common carrier, so far as it attempts by stipulation therein to exempt the carrier from liability for injuries caused by its own negligence or the negligence of its agents or employees, is unreasonable, contrary to public policy, and void. *Abrams v. Milwaukee etc. Ry. Co.*, 55.
6. **CARRIERS OF LIVESTOCK—EXTENT OF LIABILITY.**—In the absence of any agreed valuation of livestock in the contract for its carriage, the carrier cannot limit to a fixed sum its liability for injuries caused by its own negligence, or that of its agents or employees. *Abrams v. Milwaukee etc. Ry. Co.*, 55.

**7. A CARRIER OF PASSENGERS IS NOT BOUND TO PROTECT THEM FROM RAUENESS OR BAD MANNERS** on the part of strangers or other passengers not amounting to a breach of the peace. *Graeff v. Philadelphia etc. R. R.*, 885.

**8. A CARRIER OF PASSENGERS** is not guilty of actionable negligence because an injury occurs from a door being suddenly opened and pushed against one passenger by another, though, had the upper part been of glass, the passenger in fault would have seen and avoided injuring the other. Nor is such negligence inferable from the fact that a small screw eye on the inner surface of the door was at such a height that it struck the plaintiff in the eye and thereby inflicted a serious injury, if it was a usual and suitable appliance, and, but for the reckless act of a fellow-passenger in opening a door, would not have inflicted the injury. *Graeff v. Philadelphia etc. R. R.*, 885.

See **BILLS OF LADING; RAILROADS**, 4-14, 19.

#### **CERTIFICATES.**

See **CORPORATIONS**, 2; **INSURANCE**, 9.

#### **CHARTERS.**

See **CORPORATIONS**, 4, 5; **MUNICIPAL CORPORATIONS**, 8, 9; **RAILROADS**, 1, 2.

#### **CIRCUMSTANTIAL**

See **EVIDENCE**, 7-10; **MASTER AND SERVANT**, 1.

#### **CLERK OF COURT.**

See **OFFICERS**, 3.

#### **COLLATERAL ATTACK.**

See **JUDGMENTS**, 6; **TRUSTS**, 4.

#### **COLLATERAL INHERITANCES.**

See **TAXES**, 5-7.

#### **COLLATERAL SECURITY.**

See **MECHANICS' LIENS**, 3; **PLEDGE**.

#### **COMBINATIONS.**

See **CONTRACTS**, 15-18.

#### **COMMERCE.**

See **INTERSTATE COMMERCE**.

#### **COMMISSIONERS.**

See **RAILROADS**, 6, 7, 9, 12, 13.

#### **COMMISSION.**

See **AGENCY**, 7.

#### **COMMON LAW.**

See **STATUTES**, 17; **TRIAL**, 4.



COMPENSATION.

See BROKERS, 2-5; RECEIVERS, 1, 2.

COMPOSITION.

See DEBTOR AND CREDITOR.

COMPROMISE.

1. OFFERS OF SETTLEMENT—HOW REGARDED IN LAW.—The law favors offers of settlement, and will not permit them afterwards to be used to the prejudice of the parties who make them. One whose rights are threatened with irreparable injury may offer to accept a specified sum of money as full compensation therefor, and such offer, when submitted and rejected, can have no tendency, as against the party making it, to show the amount or nature of his damages. *Village of Dwight v. Hayes*, 367.
2. NUISANCE—OFFER OF SETTLEMENT FOR THE INJURY.—An offer by a landowner to permit, for a fixed sum, the discharge of sewage into a stream flowing over his land, and thereby creating a private nuisance, if rejected by the other party, cannot be resorted to for the purpose of showing that the damages to such landowner and his property, which would result from discharging the sewage of a village into the stream, might be adequately remedied by a judgment at law. *Village of Dwight v. Hayes*, 367.

See DEBTOR AND CREDITOR, 3.

CONFESSIONS.

See EVIDENCE, 3, 4.

CONFLICT OF LAWS.

See ADOPTION, 9; DISTRIBUTION; EXECUTORS AND ADMINISTRATORS, 4; STATES, 1.

CONGRESS.

See INTERSTATE COMMERCE.

CONSIDERATION.

See DEEDS, 4, 5; SPECIFIC PERFORMANCE, 1.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL PROVISION, WHEN SELF-ENFORCING.—The provision in the constitution providing that private property shall not be taken or damaged for public use without just compensation is self-enforcing. Any party injured may resort to any common-law action which will afford him adequate and appropriate means of redress. *Hickman v. City of Kansas*, 684.
2. CONSTITUTIONAL LAW.—DUE PROCESS OF LAW means the law of the land, by which is to be understood laws general in their operation, and not special laws passed to affect the rights of particular individuals against their will, and in a way in which the same rights of other persons are not affected by existing laws. *Attorney General v. Jochim*, 606.
3. DUE PROCESS OF LAW is not necessarily judicial process. Administrative process, regarded as necessary in government, and sanctioned by

long usage, is as much due process as any other. *Attorney General v. Jochim*, 606.

4. **DUE PROCESS OF LAW.**—A constitutional requirement that a person cannot be deprived of his property without due process of law does not imply that all trials in state courts affecting property must be by jury. *Attorney General v. Jochim*, 606.
5. **DUE PROCESS OF LAW.**—The state is not so bound by the term "due process of law" that it is impossible for it to invest its agents with its offices without subjecting itself, so far as their removal is concerned, to the delays and uncertainties of strict judicial action, and it may, in cases of emergency, summarily remove them if permitted by the state constitution. *Attorney General v. Jochim*, 606.
6. **PROCESS.**—A constitutional provision that the style of all process shall be "in the name of the people of the state" applies only to the judicial, and not to the executive, department. *Attorney General v. Jochim*, 606.
7. **PRODUCTION OF PARTY'S BOOKS AND PAPERS ON TRIAL.**—An order for the production of a party's books on the trial, to be used as evidence, in proper cases and upon proper showing, is not an unreasonable seizure of them. But an order by which his books are taken from his custody and committed to that of a third person, for an indefinite period of time, for an inspection, generally, into all his affairs by the opposite party and his counsel, with leave to take copies of the entries therein, is unwarranted by the law, amounts to an unlawful deprivation of his property rights, and is in palpable violation of his constitutional right to be secure against unreasonable seizure of his papers and effects. *Lester v. People*, 375.

See COURTS, 3-5; EMINENT DOMAIN, 1, 2; INTERSTATE COMMERCE, 3; LEGISLATURE; LIBEL, 6; MILLS, 2, 3; MUNICIPAL CORPORATIONS, 1, 2, 6, 7, 9, 13, 14, 17, 20, 37, 39, 48, 50; OFFICERS, 4, 9, 11, 12, 15-17, 18; STATUTES, 1-5, 7, 9-16, 18-23; SUNDAY; TAXES, 3, 5, 6.

## CONSTRUCTION.

See STATUTES, 5-7.

## CONTEMPT.

1. **RIGHT TO QUESTION PROPRIETY OF UNAUTHORIZED ORDER.**—The court exceeds its power in requiring the defendant to place his books of account in the hands of the clerk, there to remain indefinitely, with leave to the plaintiff to make copies of the entries therein, solely for the purpose of enabling him to prepare his case, and the defendant may disobey such order, and will not be liable to attachment as for a contempt. *Lester v. People*, 375.
2. **CONDUCT OF PROCEEDING.**—When the proceeding is for criminal contempt the more appropriate and general practice is to prosecute in the name of the people; but where the proceeding is really but an incident of the principal suit the practice seems to be to entitle and file the papers in the original cause. *Lester v. People*, 375.
3. **WHEN A CRIMINAL PROCEEDING.**—When the contempt consists of something done or omitted, in the presence of the court, tending to impede or interrupt its proceedings or lessen its dignity, or, out of its presence, in disregard or abuse of its process, or in doing some act injurious to a party protected by the order of the court, which has been forbidden by its order, the proceeding is punitive, and by way of

punishment for the wrongful act, and to vindicate the authority and dignity of the people, as represented in and by their judicial proceedings. *Lester v. People*, 375.

4. **CIVIL PROCEEDING—APPEAL.**—Where a party to a civil suit having the right to demand that the other party do some act for his benefit and to his advantage in the litigation, obtains an order of the court commanding it to be done, and, upon refusal, the court, by way of execution of its order, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit, it is a civil proceeding, and an appeal lies from the final order as in other civil causes. *Lester v. People*, 375.

See **APPEAL**, 9, 17,

### CONTRACTORS.

See **LIENS; MUNICIPAL CORPORATIONS**, 49.

### CONTRACTS.

1. **WHEN COMPLETE.**—When parties enter in a general contract, and the understanding is that it is to be reduced to writing, or if it is already in a written form, that it is to be signed before it is to be acted on, or to take effect, it is not binding until it is so written or signed. *Mississippi etc. S. S. Co. v. Swift*, 545.
2. **WHEN COMPLETE.**—When correspondence indicates that a formal draft of a contract was in the minds of the parties, or at least in the mind of the party sought to be charged, as the only authoritative evidence of a contract, and that he did not have, nor signify, any intention to be bound until the written draft had been made and signed, he is not bound until such draft is duly made and signed. *Mississippi etc. S. S. Co. v. Swift*, 545.
3. **WHEN COMPLETE—EVIDENCE.**—If a written draft of a contract is proposed, suggested, or referred to, during the negotiations it is some evidence that the parties intended it to be the final closing of the contract. *Mississippi etc. S. S. Co. v. Swift*, 545.
4. **WHEN COMPLETE—SIGNING.**—If the written draft of a contract is viewed by the parties thereto merely as a convenient memorial or record of their previous contract the fact that such draft is not signed by them does not affect the force of the contract; but, if it is viewed as a consummation of the negotiation, there is no contract until the written draft is finally signed. *Mississippi etc. S. S. Co. v. Swift*, 545.
5. **WHEN COMPLETE—INTENTION.**—When one sought to be charged intends to close a contract prior to the signing of a draft thereof, or if he signifies such intention to the other party, he is bound by the contract actually made, though the written draft is not signed; but if he neither has closed, nor signified an intention to close, the contract until it is fully expressed in writing and attested by signatures, he is not bound until such signatures are affixed. The burden of proof is upon the party claiming the completion of the contract before the written draft thereof is signed. *Mississippi etc. S. S. Co. v. Swift*, 545.
6. **CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The legislature can deny the right to contract to those who are incapable of binding themselves thereby, or it may prohibit the making of contracts when it becomes necessary to protect the rights of others. *Leep v. St. Louis etc. Ry. Co.*, 109.

7. **CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The legislature can control to some extent the right to contract in reference to property clothed with a public interest, where used in a manner to make it of public consequence, and affect the community at large. It can fix the maximum of charges for the storage of grain in public warehouses, and for the carriage of freight and passengers by carriers, and for services rendered, accommodations furnished, and articles sold by parties pursuing certain avocations. *Leep v. St. Louis etc. Ry. Co.*, 109.
8. **CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The power of the legislature to control and limit the right to contract is always based on some condition, and not on the absolute right to control, and such right cannot be limited by arbitrary legislation resting on no reason upon which it can be defended. Such power cannot exist, as it is subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness: *Leep v. St. Louis etc. Ry. Co.*, 109.
9. **CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof. *Leep v. St. Louis etc. Ry. Co.*, 109.
10. **CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT.**—The legislature cannot restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which they are earned, or that the price of property sold shall be paid on a day subsequent to the sale. This rule does not always apply to corporations. *Leep v. St. Louis etc. Ry. Co.*, 109.
11. **WHO MAY SUE THEREON.**—A person for whose benefit an express promise is made in a valid contract between others may maintain an action thereon in his own name. The contract must have been made for his benefit as its object, and he must be intended to be benefited thereby. *Hosmon v. Trenton Water Co.*, 654.
12. **WHO MAY SUE THEREON.**—A third person who is only indirectly and incidentally benefited by a contract has no right of action thereon. *Hosmon v. Trenton Water Co.*, 654.
13. **STATUTE OF FRAUDS—MEMORANDUM.**—Verbal promise upon a sufficient consideration to answer for the debt of another is taken out of the operation of the statute of frauds by the subsequent execution of a sufficient promise in writing, although no new consideration passes. *Sheehy v. Fulton*, 767.
14. **AGREEMENT—STATUTE OF FRAUDS.**—A parol agreement to devise and bequeath real and personal property as compensation for services rendered by a relative is within the statute of frauds, as to the real estate, and, the contract being indivisible, the whole agreement fails. But in such case the relative may recover for his services what they may be shown to have been reasonably worth, and such void agreement may be shown in evidence to rebut the presumption that they were rendered gratuitously. *Estate of Kessler*, 74.
15. **TRADE, CONTRACT IN RESTRAINT OF.**—An association or combination of individuals, the object of which is to enable its members to regulate

and control the price of beer in a designated city and county, is in unlawful restraint of trade. *Nester v. Continental Brewing Co.*, 894.

16. **CONTRACT IN RESTRAINT OF TRADE.**—EQUITY WILL NOT COMPEL AN ASSOCIATION, formed for the purpose of restraining trade by controlling the price of an article and preventing its sale except at a price agreed upon, to pay to one of its members his share of the profits or moneys realized by it if the complainant requires the aid of the illegal contract or transaction to establish his cause. *Nester v. Continental Brewing Co.*, 894.
  17. **CONTRACT IN RESTRAINT OF TRADE, THOUGH PARTIAL AND CONFINED IN ITS OPERATION** to a designated city and county, is unlawful if injurious to the public interests, as where it provides that the signers will not sell an article of prime necessity, or even of frequent use, in such city and county, or to be used therein to persons other than such signers except at a price therein specified. *Nester v. Continental Brewing Co.*, 894.
  18. **CONTRACT IN RESTRAINT OF TRADE IS NOT RENDERED LAWFUL** by the fact that the articles affected by it are not necessities of life. Hence, a pool or combination to control the price of beer in a city and county is unlawful. *Nester v. Continental Brewing Co.*, 894.
  19. **CLAIM AGAINST ESTATE OF DECEDENT — DEMAND** — Where an oral agreement to devise and bequeath property as compensation for services rendered by a relative fails, because within the statute of frauds, a cause of action, *quantum meruit*, for the services does not accrue until the death of the intestate, and demand is properly made by filing the claim against her estate for allowance. *Estate of Kessler*, 74.
  20. **WAIVER OF BREACH.**—Where a contract to furnish a steam boiler, guaranteed to be a first-class job, contains no specification as to how the grate-hangers should be placed in the furnace, and they are placed in accordance with a common and approved mode of construction, the purchaser cannot object that some other mode was not adopted. And if he saw when the boiler was delivered that the grate-hangers were too high, and assumed to change their location himself, although the manufacturer offered to do it, he afterwards has no cause for complaint that they were wrongly placed. *Milwaukee Boiler Co. v. Duncan*, 33.
- See **BILLS OF LADING**; **CORPORATIONS**, 4; **DAMAGES**, 6; **INSANE PERSONS**; **MASTER AND SERVANT**; **OFFICERS**, 5, 6; **REWARDS**, 1; **SALES**; **SPECIFIC PERFORMANCE**, 1; **STATUTES**, 14, 18; **WATER COMPANIES**.

#### CONTRIBUTION.

See **SURETYSHIP**, 2.

#### CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE**, 5-7, 13.

#### CONVERSION.

See **TROVER**.

#### CONVEYANCES.

See **DEEDS**; **NOTICE**, 2.

#### CORPORATIONS.

**DEFECTS IN ORGANIZATION OF.**—The formation of a corporation cannot be accomplished except by a substantial compliance with the statute. *Martin v. Deetz*, 151.

2. **THE FAILURE TO FILE ARTICLES OF INCORPORATION IN THE OFFICE OF THE COUNTY CLERK OF THE COUNTY** which is designated in such articles as being the place where the principal business is to be transacted, though such articles are filed in the office of the county clerk of another county, and a certificate is issued by the secretary of state in due form of law, stating that such articles had been filed in the proper county, is fatal to the existence of a corporation *de jure*. *Martin v. Deetz*, 151.
3. **CORPORATION DE FACTO, EXISTENCE OF, WHEN MAY BE PUT IN ISSUE.** Under a statute declaring that if a corporation does not organize within one year from the date of its incorporation its corporate power shall cease, but that the due incorporation of any company claiming in good faith to be a corporation and doing business as such, and its right to exercise corporate powers, shall not be inquired into collaterally in a private action to which such corporation *de facto* may be a party, but such inquiry may be had at the suit of the state on the information of the attorney general, the mere filing of a complaint in which the company is averred to be a corporation does not estop all the world, except the state, from denying the existence of such a corporation. The averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*. Where there is no corporation *de jure* there cannot be a corporation *de facto*, unless the alleged corporation has at least attempted to do some corporate act or to exercise some corporate power. *Martin v. Deetz*, 151.
4. **CONSTITUTIONAL LAW—AMENDMENT OF CHARTER—CONTROL OF RIGHT TO CONTRACT.**—The legislature under a reserved power to amend the charters of corporations cannot take from them the right to contract; it can regulate that right when the public interest demands it, but not to such an extent as to render it ineffectual or substantially impair the object of the corporation. *Leep v. St. Louis etc. Ry. Co.*, 109.
5. **CONSTITUTIONAL LAW—LIMITATION OF POWERS.**—Corporations possess only those powers or properties which the charters of their creation confer upon them, either expressly or as incidental to their existence, and these may be modified or extinguished by the legislature by amendment or repeal of their charters. *Leep v. St. Louis etc. Ry. Co.*, 109.
6. **PERSONAL LIABILITY OF STOCKHOLDERS—ENFORCING IN ANOTHER STATE.** If the statutes of a state in which a corporation is organized create a liability against its stockholders for their proportion of its debts the liability may be enforced by an action against them, or any of them, in any other state in which jurisdiction over them can be obtained. Nor does the fact that in the state in which the action is brought the liability of a stockholder in a domestic corporation can be enforced only by a suit in equity require the creditor of the foreign corporation to resort to a like suit, nor exclude him from his remedy by an action at law. *Aldrich v. Anchor Coal etc. Co.*, 831.
7. **AN ACTION FOR DAMAGES FOR PREVENTING THE FORMATION OF A CORPORATION,** if it can be maintained at all, can be sustained only by some natural person injured thereby, and not by or in the name of the corporation which was prevented from being incorporated. *Martin v. Deetz*, 151.
8. **PROCESS AGAINST A CORPORATION MUST BE SERVED** upon its principal officer within the jurisdiction of the sovereignty by whose laws it exists, and authority for serving it in any other manner must be conferred by

the statute of the state where the process is served. *Aldrich v. Anchor Coal etc. Co.*, 831.

9. JURISDICTION OVER FOREIGN.—Service of process on an officer of a foreign corporation who is casually in this state does not, in the absence of a statute conferring authority to make such service, give the courts of this state jurisdiction over such corporation when it has neither an agency nor property in this state, and has not done business therein other than entering into a contract to be performed in another state. *Aldrich v. Anchor Coal etc. Co.*, 831.

10. PROCESS MAY BE SERVED ON A FOREIGN CORPORATION in this state if it is doing business here and the action arises out of such business. *Aldrich v. Anchor Coal etc. Co.*, 831.

See DAMAGES, 2.

### CORPUS DELICTI.

See CRIMINAL LAW, 2.

### COSTS.

See APPEAL, 11.

### COTENANCY.

1. RIGHT OF PART OWNER TO TERMINATE TENANCY OF HIS PART.—When a building owned in common is occupied by a tenant of the different co-owners under separate agreements between them and himself, one of such owners of an undivided one-fourth interest in the building cannot arbitrarily terminate the tenancy as to his share in the premises by raising the rent thereon, and, if the tenant necessarily continues to occupy the whole building, he is liable to such part owner only for reasonable rent for the beneficial use of his share of the premises. *Nott v. Owen*, 525.
2. ADVERSE POSSESSION.—As between cotenants evidence of long-continued, visible, uninterrupted, and even exclusive occupation by one cotenant does not bar the rights of the others. To constitute an adverse possession in such case there must be an actual ouster, and an exclusion of the other cotenants by the one in possession. *Manfield v. McGinness*, 532.

See PARTITION.

### COUNTERCLAIM.

See TRIAL, 8.

### COURTS.

1. RULES OF COURT in contravention of the organic or statute law of the state are to that extent void. *State v. Gileon*, 634.
2. CRIMINAL LAW, RULE OF COURT LIMITING RIGHT TO WITNESSES.—A rule of court declaring the number of witnesses for which parties in criminal prosecutions shall be entitled to have subpoenas issued as of course, and that parties desiring subpoenas for a greater number shall apply to the court by motion, supported by affidavit, setting forth the names of the witnesses desired, what facts they are expected to testify to, that the same are believed to be true, that the same are material to the issues involved or which may arise in the case, setting out fully the facts wherein its materiality consists, and that the facts desired to be established by



such witnesses cannot be established by witnesses for whom subpoenas have issued as of course, and, if required by the court, shall further set out what the witnesses for whom subpoenas have issued as of course will testify to, is void, because in conflict with the bill of rights guaranteeing "in criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, and to have process to compel the attendance of witnesses in his behalf, and with the provision of the state statutes declaring that every person indicted and prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process of witnesses in his behalf. *State v. Gilcon*, 634.

3. **JURISDICTION OF SUPREME COURT.**—Whenever a constitutional question is necessarily to be determined an appeal or writ of error can be taken from the final judgment of the trial court to the supreme court, but the constitutional question invoked to give the latter court jurisdiction must be fairly debatable, and not based on mere assertion. *Trimble v. People*, 236.
4. **OF SUPREME COURT JURISDICTION.**—Whenever the construction of a constitutional question, state or national, is properly before the supreme court, and necessary to the determination of the case, that court has entire jurisdiction, not only of such question but of all other matters necessary to a complete determination of the controversy. *Trimble v. People*, 236.
5. **APPEAL—JURISDICTION OF SUPREME COURT.**—In an order or proceeding involving the construction of a constitutional provision the supreme court has jurisdiction on direct appeal from the trial court. *Lester v. State*, 375.
6. **PROBATE COURTS ARE TRIBUNALS OF SPECIAL AND LIMITED JURISDICTION,** and can exercise only such powers as are directly conferred upon them by statute, and such as may be incidentally necessary to the execution of these powers. *Smith v. Howard*, 537.

See **ABATEMENT; CONTEMPT; MUNICIPAL CORPORATIONS**, 2, 3, 15; **OFFICERS**, 20.

## CRIMINAL LAW.

1. **CRIMINAL PLEADING.**—A PLEA OF AUTREFOIS ACQUIT IS NOT SUFFICIENT in law if the matter set out in the second indictment is not admissible under the first, and a conviction cannot be properly sustained on such evidence. *Dill v. People*, 254.
2. **SUFFICIENCY OF PROOF.**—In criminal cases there must be proof of the *corpus delicti*, and of the identity of the prisoner. It must be shown that the act itself was done, and that it was done by the person charged. *Carlton v. People*, 346.
3. **COMPETENCY OF EVIDENCE FOR ACCUSED.**—It is competent for the accused to show, by any legal evidence, that another committed the crime with which he is charged, and that he is innocent of any participation in it, but he cannot do this by the admissions or confessions of a third person not under oath. There must be proof of such a train of facts and circumstances as tend clearly to point to such other, rather than to the accused, as the guilty party. *Carlton v. People*, 346.
4. **ALIBI—PROOF IN SUPPORT OF.**—In order to establish an *alibi* in a criminal case the burden of proof is upon the accused to show facts and circumstances sufficient, when considered with all the other evidence in

the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him. *Carlton v. People*, 346.

**See ARSON; CONTEMPT, 2, 3; COURTS, 2; EVIDENCE, 9, 10; EXTRADITION; HOMICIDE; INDICTMENT; LARCENY; MUNICIPAL CORPORATIONS, 34; PERJURY; ROBBERY; STATES; STATUTES, 13; TRIAL, 2; WITNESSES, 2, 3.**

### CROPS.

**See SALES, 13, 14.**

### DAMAGES.

- 1. EVIDENCE OF DAMAGES, WHEN SUFFICIENT.**—Evidence that plaintiff gave her note to her attorneys for two hundred dollars, as a fee for their services in the case, does not justify a finding that such sum is a fair compensation for time and moneys expended in the pursuit of the property sued for. *Murphy v. Mulgrew*, 200.
- 2. DAMAGES FOR MENTAL SUFFERING** are generally allowed by the courts in the following cases: 1. Where, by the merely negligent act of the defendant, physical injury has been sustained; 2. In actions for breach of the contract of marriage; 3. In cases of willful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party. *Summerfield v. Western Union Tel. Co.*, 17.
- 3. FOR THE FAILURE OF A PERSON TO ACT AS A DIRECTOR OF A CORPORATION** or to assist in its organization, the damages recoverable against him cannot include loss sustained by reason of the principal incorporators being in indigent circumstances and unable to raise moneys to continue the business, and their consequent loss of profits which they might have realized had such business been continued. *Martin v. Deetz*, 151.
- 4. DAMAGES FROM OVERFLOW OF LANDS—ELEMENTS OF DAMAGE.**—In an action to recover damages for an overflow of land caused by the negligent discharge of surface water thereon, recovery may be had for deposits of earth, clay, and like substances naturally resulting from such overflow, although such items of damage are not specially pleaded. *Hunt v. Iowa Cent. Ry. Co.*, 473.
- 5. PROSPECTIVE PROFITS** are not allowed as damages for a tort or for the breach of a contract, unless they are the clear, proximate, and natural results of the wrong, and are confined to the principal thing complained of and to its naturally attendant circumstances. *Martin v. Deetz*, 151.
- 6. CONTRACT—BREACH—DUTY NOT TO ENHANCE DAMAGES.**—Where a party has been damaged by the failure of another to perform his contract the law does not permit him to so conduct himself as to enhance the damages, and recover the damages so enhanced. *Milwaukee Boiler Co. v. Duncan*, 33.

**See BROKERS, 3, 4; INJUNCTIONS, 1; LIBEL, 1, 3, 4, 7; LIMITATIONS OF ACTIONS, 6; MUNICIPAL CORPORATIONS, 37–39; RAILROADS, 15–17; TELEGRAPH COMPANIES, 1–4; TROVER.**

### DAMNUM ABSQUE INJURIA.

**See REAL PROPERTY, 2, 3; WATERS, 4, 5.**

### DEBTOR AND CREDITOR.

- 1. PART PAYMENT AS DISCHARGE—TENDER.**—The acceptance by the holder of a note past due of a less sum than the face of the note, with an agree-

ment to discharge the debt, does not operate to fully release the debtor, but is a payment *pro tanto* only, and the holder of the note need not, before bringing suit to recover the amount unpaid, tender the amount received, and thus repudiate such agreement. *Leeson v. Anderson*, 597.

2. **PART PAYMENT AS DISCHARGE—RELEASE WITHOUT CONSIDERATION.**—A debtor, in paying a portion only of a debt, when he is bound to pay the whole, furnishes no consideration for a promise by the creditor to fully discharge him. Such payment is *pro tanto* only, and the creditor need not tender back the amount received, and thus repudiate the agreement before bringing suit for the amount remaining unpaid. *Leeson v. Anderson*, 597.
3. **PART PAYMENT WHEN DISCHARGES DEBT.**—Part payment made in compromise of a claim over which there is an honest dispute, or by general composition with creditors, or if the payment is made in something other than money, under an agreement that such payment shall discharge the whole debt, is valid, and has that effect. *Leeson v. Anderson*, 597.

#### DECEDENT ESTATES.

See EXECUTORS AND ADMINISTRATORS; PARTITION, 3, 4.

#### DECLARATIONS.

See AGENCY, 1-3; EVIDENCE, 5.

#### DEDICATION.

See EASEMENTS, 1; MUNICIPAL CORPORATIONS, 35, 36.

#### DEEDS.

1. **CONVEYANCE—CONSTRUCTION OF.**—A conveyance purporting to convey "one divided fourth part" of certain real property will not be treated as conveying an undivided fourth part of such property if the grantee did not then have any interest beyond an estate for life. The word "divided" cannot be rejected from the description. *Ford v. Unity Church Soc.*, 711.
2. **REGISTRATION OF A DEED IS COMPLETE WHEN IT HAS BEEN FILED** with the register for such registration. *Davis v. Whitaker*, 793.
3. **REGISTRATION OF DEEDS.**—THE FAILURE OF THE RECORDER OF DEEDS TO INDEX a conveyance left with him for registration, and which is otherwise duly registered, does not impair the legal effect of the registration. *Davis v. Whitaker*, 793.
4. **MARRIAGE AS CONSIDERATION FOR DEED.**—Promise of marriage is a valuable consideration for a deed, and if the marriage afterwards takes place the deed is valid so far as the consideration is concerned. Any fraud intended by the grantor upon his creditors does not avoid the deed if the grantee is innocent. *Tolman v. Ward*, 556.
5. **MARRIAGE MAY BE GIVEN IN EVIDENCE AS THE CONSIDERATION** of a deed expressed to be for a money consideration only. *Tolman v. Ward*, 556.

See ESTOPPEL; GIFTS; MORTGAGE, 2; NOTICE, 2.

#### DE FACTO.

See CORPORATIONS, 3; INDICTMENT, 1, 2.

## DEFINITIONS.

“Credible witnesses.” *Fisher v. Spence*, 360.

Due process of law. *Attorney General v. Jochim*, 606; *Burdick v. People*, 329.

Election. *Mayor v. Shattuck*, 208.

“In the name of the people of the state.” *Attorney General v. Jochim*, 606.

Irreparable injury. *Field v. Burling*, 311.

A penalty is a punishment which the law exacts for its violation, and may be fine, forfeiture, deprivation of office or other right, or by any other means sanctioned by law. *State v. Walbridge*, 663.

Privileged Communications. *Upton v. Hume*, 863.

Public offices. *Attorney General v. Jochim*, 606.

Tickets. *Burdick v. Peogle*, 329.

“Township.” *Mayor v. Shattuck*, 208.

“Trustee.” *Johnson v. Culnan*, 224.

## DEVISE.

See CONTRACTS, 14, 19; ESTATES.

## DIRECTING VERDICT.

See TRIAL, 9.

## DISCLAIMER.

See TRUSTS, 7.

## DISCRIMINATION.

See STATUTES, 12.

## DISTRIBUTION.

**ESTATES OF DECEDENTS—CONFLICT OF LAWS.**—The disposition, succession to, and distribution of personal property wherever situated is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the property is situated. *Smith v. Howard*, 537.

See JURISDICTION, 6.

## DIVORCE.

See MARRIAGE AND DIVORCE.

## DOCKETING.

See JUDGMENTS, 4.

## DOMICILE.

See ADOPTION, 5.

## DOWER.

1. **DOWER IN MINES—WASTE.**—One occupying land as dower cannot commit waste on such land, and the opening of coal or other mines thereon amounts to waste. But it is settled in Illinois that, where mines are already opened upon land assigned as dower, the widow has the right to operate them and receive the proceeds thereof. *Pridely v. Griffith*, 397.
2. **WIDOW MAY BE ENDOWED OF MINES** opened by the heir or owner of the fee after her dower attaches and before there has been any assignment, and

it is not waste for her to work mines opened, although they had been abandoned before the death of her husband. She may construct new approaches and not be guilty of waste. *Priddy v. Griffith*, 397.

2. **DOWER IN LEASED LANDS—RENT OR ROYALTY TO WIDOW.**—Where there is a valid subsisting lease, executed by the husband in his lifetime, under which the lessees may, at any time, open mines, and by the terms of which one dollar per acre rent or royalty is to be paid annually to the lessor, his heirs, or other legal representatives who, at the time, shall be legally entitled to the life estate or fee simple title to the land, until the mines are opened, and certain fixed royalties after the mines are opened and worked, the widow of the lessor will be entitled to the rent or royalty upon lands assigned as dower after the assignment. And should the lessees open mines on the lands assigned as dower, without the consent of the widow, she would be entitled to the royalty named in the lease. *Priddy v. Griffith*, 397.

#### DUE PROCESS OF LAW.

See CONSTITUTIONS, 2-5; OFFICERS, 4; STATUTES, 20-22; TAXES, 5.

#### EASEMENTS.

1. **STREETS—EASEMENT OF LIGHT AND AIR.**—A private individual cannot appropriate to his own exclusive use a portion of the surface of a street dedicated to the public use, and a dedication of a strip of land for a public street embraces not only the surface of the ground but the air and light above, and an individual has no more right to obstruct the light and air above the street than he has to obstruct the surface of the soil. *Field v. Barling*, 311.
2. **HIGHWAYS—EASEMENT OF LIGHT AND AIR.**—When a strip of land is declared a public highway, the adjoining owner has the right to light and air from it. The column of light and air above the roadbed is as much a part of the highway as the roadbed itself; and when cities or towns have been built up along a public highway the right to light and air from it becomes vested. Even the legislature has no power to deprive abutting owners of it without compensation. *Field v. Barling*, 311.
3. **MUNICIPAL CORPORATIONS—STREETS—DEDICATION—RIGHT OF LOT-OWNERS TO LIGHT AND AIR.**—When the original owner of an addition to a city makes a plat dividing the land into blocks and lots, streets and alleys, and sells and conveys the lots with reference to that plat, a right arises in favor of purchasers of lots fronting on a street to have it forever kept open, and free from obstruction from the surface of the soil to the sky, for the passage of light and air. No grant or covenant is required to create this right which may be regarded as an incorporeal hereditament appurtenant to the lots. *Field v. Barling*, 311.
4. **RIGHT TO POLLUTE WATERS OF STREAM.**—THE RIGHT OF A VILLAGE to pollute the waters of a stream by the discharge of sewage into it is in the nature of an easement, which can be created only by grant or prescription, and a mere oral consent to such pollution of the stream will vest in the village no right not in the power of the party giving the consent at any time to recall. And the fact that the village had expended money or incurred liabilities in the matter of constructing the sewers, on the faith of such parol license, will present no obstacle to such revocation. *Village of Dwight v. Hayer*, 367.

See INJUNCTIONS, 2; PRIVATE WAYS.

## ELECTIONS.

**EXCLUSION OF LEGAL VOTERS.**—When an election is honestly conducted the person who receives a plurality of the legal votes actually cast thereat is entitled to the office. This is so, although, through an error of judgment, the inspectors of election excluded votes of qualified electors sufficient to have changed the result. *State v. Hanson*, 38.

See **OFFICERS**, 16; **QUO WARRANTO**; **STATUTES**, 19.

## ELECTRIC WIRES.

See **MUNICIPAL CORPORATIONS**, 31, 32; **NEGLIGENCE**, 7-12.

## EMINENT DOMAIN.

1. **TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—A constitutional provision that the property of no person shall be taken or damaged for public use without just compensation is an implied prohibition on the power of the legislature to take the private property of one without his consent, even when compensation is made, and transfer it to another for his private use. *Welton v. Dickson*, 771.
2. **TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—The want of power in the legislature to take the private property of one person and transfer it to another for his private use does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of sovereign power committed to the legislature. Property can only be taken for a public use. *Welton v. Dickson*, 771.
3. **TAKING PRIVATE PROPERTY FOR PRIVATE USE.**—The right of eminent domain does not imply a right in the sovereign power to take the property of one person and transfer it to another, even for full compensation, when the public interest is in no way promoted by such transfer. *Welton v. Dickson*, 771.
4. **TAKING PRIVATE PROPERTY FOR PRIVATE WAY.**—The legislature has no power to authorize the taking of the private property of one person, even for a full compensation, and the transfer of it to another for the purposes of a private road or way, when the public interest is in no way promoted by such transfer. *Welton v. Dickson*, 771.
5. **TAKING PRIVATE PROPERTY FOR PUBLIC USE.**—Private property cannot be compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury. *Welton v. Dickson*, 771.
6. **PUBLIC USE.**—When the public exigencies demand, the exercise of the power of taking private property for public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment; but what is such public use as will justify the exercise of the power of eminent domain is a question for the courts. If a public use is declared by the legislature the courts hold the use public, unless it manifestly appears from the act that it can have no tendency to advance and promote such public use. *Welton v. Dickson*, 771.

See **CONSTITUTIONS**, 1; **MUNICIPAL CORPORATIONS**, 37, 39; **PRIVATE WAYS**, 3; **RAILROADS**, 15, 16.

## ENTIRETIES.

See **HUSBAND AND WIFE**, 2, 4.

## EQUITY.

1. **INJUNCTION—EQUITABLE JURISDICTION.**—The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction in petitions for injunction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed by the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Welton v. Dickson*, 771.
  2. **EQUITY WILL NOT ASSIST A COMPLAINANT WHOSE CAUSE OF ACTION RESTS UPON A TRANSGRESSION OF THE LAWS** of his country, though the defendant has realized and retains profits resulting from the forbidden transaction in which both participated under an agreement to share the profits thereof. *Nester v. Continental Brewing Co.*, 594.
- See **CONTRACTS**, 16; **INJUNCTIONS**; **INSANE PERSONS**; **JURISDICTION**, 2, 3; **MORTGAGES**; **TRUSTS**, 6.

## ERROR.

See **APPEAL**.

## ESTATES.

- A CONVEYANCE OR DEVISE TO SARAH H. AND HER CHILDREN** vests in her a life estate with a remainder in fee to her children as a class. Her after-born children are entitled to participate in the benefits of such devise or conveyance. *Hague v. Hague*, 900.

## ESTOPPEL.

- INURING OF TITLE BY—NOTICE OF.**—If a person has, before acquiring title to real property, made a conveyance thereof in such a form that the title, when acquired, vests in his grantee under the pre-existing deed, nevertheless, the record of such deed does not operate as constructive notice to a person purchasing from the common grantor after his acquisition of the title, and such subsequent purchaser may therefore, unless he had actual notice of the first conveyance, hold the property as against the first grantee to whom the title inured. *Ford v. Unity Church Society*, 711.

See **ADOPTION**, 5, 6; **MUNICIPAL CORPORATIONS**, 47.

## EVIDENCE.

1. **WARRANTIES.—PAROL EVIDENCE IS NOT ADMISSIBLE** to add to an unambiguous writing facts which may aid the implication of a warranty. *McCray Refrigerator etc. Co. v. Woods*, 599.
2. **JUDICIAL NOTICE.**—State courts do not take judicial notice of former adjudications in federal courts upon the subject matter in controversy. *Kilpatrick v. Kansas City, etc. R. R. Co.*, 741.
3. **CONFESSIONS UNDER OATH.**—Testimony or a confession given before a grand jury, under oath and involuntarily, by one at the time under arrest and charged with the crime then inquired about, without informing him of his rights or of the effect of his testimony, or the possibility of its use against him, is inadmissible on his subsequent trial for such crime. *State v. Clifford*, 518.



4. **CONFESSIONS UNDER OATH.**—A statute providing that a member of the grand jury may be compelled to disclose the testimony of a witness examined before such jury to ascertain if it is consistent with that given by him at the trial, does not make testimony given before a grand jury under oath, and involuntarily, by one at the time under arrest and charged with the crime then inquired about, competent on his trial for such crime. *State v. Clifford*, 518.
  5. **CHANGE OF POSSESSION.**—THE DECLARATIONS OF A VENDOR OF PERSONAL PROPERTY, while he remains in possession thereof, though after the sale, as to the character of his possession, are admissible in evidence against his vendee. *Murphy v. Mulgrew*, 200.
  6. **THREATS OF A THIRD PERSON**, other than the prisoner on trial, against the victim of the crime charged are mere hearsay, and are inadmissible in evidence. *Carlton v. People*, 346.
  7. **CIRCUMSTANTIAL EVIDENCE.**—AVERRING CIRCUMSTANCES WHICH MAY BE JUDICIALLY CONSIDERED, as leading to well-grounded presumptions, are motives to crime, declarations or acts indicative of guilty consciousness or intention, and preparations for the commission of crime. *Carlton v. People*, 346.
  8. **CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY OF.**—In both criminal and civil cases a verdict may be founded on circumstances alone, and the legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Absolute certainty is not essential to proof by circumstances, and if they produce moral certainty to the exclusion of every reasonable doubt, it is sufficient. *Carlton v. People*, 346.
  9. **CIRCUMSTANTIAL EVIDENCE—CONVICTION OF CRIME.**—To warrant a conviction of crime on circumstantial evidence, the circumstances taken together should be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis. *Carlton v. People*, 346.
  10. **VERDICT ON CIRCUMSTANTIAL EVIDENCE.**—To justify a conviction of crime on circumstantial evidence alone it must be inconsistent with any reasonable theory of innocence. A verdict based on evidence which only raises a suspicion, but does not point with reasonable certainty to guilt, must be set aside. *State v. Clifford*, 518.
  11. **MUNICIPAL ORDINANCE** contained in a printed book in charge of the proper custodian, purporting to have been printed by authority of the city, is admissible in evidence without other proof under the statutes of Missouri. *City of Turkio v. Cook*, 678.
- See** ADOPTION, 3; BROKERS, 5; CONTRACTS, 3; CRIMINAL LAW, 3; DAMAGES, 1; HOMICIDE; JURISDICTION, 1; LEGISLATURE; LIBEL, 4; MARRIAGE AND DIVORCE; MORTGAGES, 2; NEGLIGENCE, 12; NEGOTIABLE INSTRUMENTS, 3; RAILROADS, 6, 10, 12; SALES, 4-6; SERVICES, 2; TRIAL, 3.

#### EXCEPTIONS.

See APPEAL, 7, 16.

#### EXECUTION.

See TROVER.

**EXECUTORS AND ADMINISTRATORS.**

1. **ESTATES OF DECEDENTS.—PROCEEDINGS FOR THE ADMINISTRATION** of the estates of deceased persons and for their distribution are purely statutory. *Buckley v. Superior Court*, 135.
2. **FOREIGN EXECUTORS AND ADMINISTRATORS—LETTERS OF ADMINISTRATION** have no legal force or effect beyond the territorial limits of the state in which they are granted. *Smith v. Howard*, 537.
3. **ESTATES OF DECEDENTS—WIDOW'S ALLOWANCE—CONFLICT OF LAWS.—A** probate court of one state has no jurisdiction to decree an allowance to a widow of a nonresident decedent from assets within its jurisdiction on which there is ancillary administration. A widow's claim for allowance is not only controlled by the law of the state where the husband resided at the time of his death, but it must also be granted by the probate court of that state. *Smith v. Howard*, 537.
4. **ESTATES OF DECEDENTS—WIDOW'S ALLOWANCE—CONFLICT OF LAWS.—A** widow's claim for allowance is not a matter of legal right. It rests in the discretion of the probate court, and, when such claim for an allowance from the personal property of the husband is presented, the question must be determined and the amount regulated by the law of the place where the family had their home at the time of the husband's death. *Smith v. Howard*, 537.

See PLEDGE, 1.

**EXEMPTION.**

See PROCESS; TAXES, 4, 7.

**EXPERTS.**

See BROKERS, 5.

**EX POST FACTO.**

See MUNICIPAL CORPORATIONS, 25; STATUTES, 12.

**EXTRADITION.**

1. **SURRENDER OF FUGITIVE BY NATION NOT REQUIRED TO DO SO BY TREATY.—**If a fugitive from justice is surrendered by a foreign nation having an extradition treaty with the United States agreeing to surrender fugitives accused of certain crimes of which that charged is not one, such person is not, on being brought into this state, entitled to be released from custody because the crime was not one included in the terms of the treaty. The existence of the treaty did not deprive the foreign nation of power to surrender fugitives from justice accused of crimes not named therein nor the United States of the right to receive such fugitive into its custody. *Ex parte Foss*, 182.
2. **PROSECUTION ON OTHER CHARGES.—**If a fugitive from justice is surrendered by a foreign nation and brought to this state, and thereafter the indictment against him is set aside, this is not equivalent to his acquittal, and he may be prosecuted upon another accusation of the same crime. *Ex parte Foss*, 182.

**FALSE REPRESENTATIONS.**

See AGENCY, 1.

## FINDINGS.

See JUDGMENTS, 1.

## FINES.

See MUNICIPAL CORPORATIONS, 32.

## FIREMEN.

See TAXES, 3, 8.

## FOOTPRINTS.

See ARSON, 2.

## FORFEITURE.

See INSANE PERSONS, 1.

## FRANCHISES.

See RAILROADS, 2.

## FRAUD.

See DEEDS, 4; INSANE PERSONS, 2; MISTAKE; SCHOOLS.

## FRAUDULENT CONVEYANCES.

See SHERIFFS.

## FREIGHT.

See RAILROADS, 5-12.

## FUGITIVES.

See EXTRADITION.

## GIFTS.

**ESTOPPEL—INURING OF TITLE BY.**—IF A DEED OF GIFT contains words of conveyance purporting to convey property in fee simple, any title subsequently acquired by the grantor will vest in the grantee as against subsequent purchasers having notice of such deed. *Ford v. Unity Church Society*, 711.

## GOVERNOR.

See MANDAMUS, 1; OFFICERS, 11, 13-17.

## GRADING.

See MUNICIPAL CORPORATIONS, 37-38.

## GRAND JURY.

See INDICTMENT, 1, 3.

## GUARDIAN AND WARD.

1. **PARTY TO ACTIONS—INFANTS.**—Though a guardian of an infant or insane defendant should appear for him, such guardian is no more a party to the action than is his attorney therein. *Redmond v. Peterson*, 204.
2. **JURISDICTION—INFANTS AND INCOMPETENTS, ENTERING APPEARANCE OF IN ACTIONS.**—The general guardian of an infant or incompetent person has authority, without the service of any process whatever, to enter the

appearance of his ward in an action pending against him, and such appearance confers jurisdiction upon the court to the same extent as if the process had been personally served in the manner prescribed by the statute. *Redmond v. Peterson*, 204.

3. **JURISDICTION—CHANGE OF PARTIES.**—If a suit is brought against the guardian of an infant or incompetent person, and without any order of court an amended complaint is subsequently filed from which such guardian is dropped as a party defendant and his ward named in his place, and after the appearance of the ward by his guardian a judgment is entered upon such complaint, it is valid and not subject to reversal upon appeal. *Redmond v. Peterson*, 204.

See **APPEAL**, 2; **INFANTS**; **INSANE PERSONS**, 1.

## HABEAS CORPUS.

**JURISDICTION.**—NOTHING LESS THAN JURISDICTIONAL DEFECTS in the proceedings can be considered, or will justify the discharge of a prisoner on *habeas corpus*. *State v. Noyes*, 45.

## HEIRS.

See **ADOPTION**, 6, 8, 9; **APPEAL**, 2.

## HIGHWAYS.

1. **DEFECTS OR OBSTRUCTIONS IN.**—Ditches or gutters on the sides of highways designed and convenient for drainage, with walks in the nature of bridges across the same, for the use of pedestrians, leaving unobstructed the traveled portion of the road, cannot be considered defects or obstructions in the highway. *Lohery v. Town of Amherst*, 69.

2. **REASONABLE USE OF.**—The question of reasonable necessity and use of the margin of a highway by an abutting owner is ordinarily one for the jury, and usually arises where a larger portion is occupied than is deemed fairly necessary for the purpose, or its use is claimed to have been unreasonably prolonged. But where, under conceded facts, no more space was used than was actually occupied by two mortar-boxes of ordinary size, a barrel of lime and some sand, and there is no claim that the use was prolonged for an unreasonable time, the question is one for the court, and the case ought not to be submitted to the jury. *Lohery v. Town of Amherst*, 69.

3. **ABUTTING OWNERSHIP—EVIDENCE.**—Evidence of one's occupation and use of premises, in front of which he had placed building material is presumptive evidence of his ownership of the premises so as to make him an abutter on the highway, with the rights of an abutting owner. *Lohery v. Town of Amherst*, 69.

4. **RIGHTS OF ABUTTER ON.**—An abutting owner on a public street or highway has a right to use temporarily a reasonable portion thereof for the deposit of mortar-boxes, etc., while necessarily used in repairing his house, and, although he might be able to use his yard or garden for the purpose, he is not bound to do so at the peril of injury to his shrubbery or plants, and may insist upon his rights as an abutting owner. *Lohery v. Town of Amherst*, 69.

See **ENCROACHMENTS**, 2.

## HOMICIDE.

**CRIMINAL LAW—EVIDENCE OF REPUTATION FOR PEACE AND QUIETUDE.—**

Evidence of the general reputation of the accused for peace and quietude is admissible in a prosecution for murder, though committed by poisoning. *Carr v. State*, 408.

## HOTELS.

See RECEIVERS, 8.

## HUSBAND AND WIFE.

1. **SEPARATION—LIABILITY OF HUSBAND FOR NECESSARIES FURNISHED WIFE.**—Without a special promise of the husband to pay for the board and lodging of his wife, living apart from him, he is not liable therefor unless she is living separate from him by his consent, or his conduct is such as to justify her in thus living apart from him. *Belknap v. Stewart*, 729.
  2. **TENANCY BY ENTIRETIES.**—Tenancy by entireties is to be presumed when the grantees are husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. *Thornberg v. Wiggins*, 422.
  3. **JOINT TENANCY.**—HUSBAND AND WIFE may take real estate as joint tenants or as tenants in common, if the instruments creating the title use apt words for the purpose. *Thornberg v. Wiggins*, 422.
  4. **JOINT TENANCY—HUSBAND AND WIFE—EXECUTION.**—A grant of land to husband and wife "in joint tenancy" makes them joint tenants, and not tenants by entireties therein, and the interest of each is subject to execution. *Thornberg v. Wiggins*, 422.
- See ADOPTION, 2; AGENCY, 1; MARRIAGE AND DIVORCE; SALES, 1, 3; WILLS, 3, 6; WITNESSES, 2, 3.

## IMPRISONMENT.

See APPEAL, 9.

## IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 38.

## INDEBTEDNESS.

See MUNICIPAL CORPORATIONS, 5, 7, 48.

## INDICTMENT.

1. **GRAND JURY—DE FACTO.**—The object of the *de facto* doctrine is to protect those interests of the public involved in the official acts of persons exercising the duties of an office without being a lawful officer, and the doctrine is applicable to the acts of a grand jury *de facto*. *State v. Noyes*, 45.
2. **CRIMINAL PLEADING—VARIANCE.**—In criminal pleadings the time at which an offense is charged to have been committed is not material, unless time is of the essence or gist thereof. *Dill v. People*, 254.
3. **GRAND JURY—VALID INDICTMENTS.**—Where a legal grand jury impaneled for one term of court holds over into the next succeeding term, and at such term is recognized by the court as a lawful grand jury, it is a good and sufficient grand jury *de facto*, and indictments found by it are not void, but good and valid as against collateral proceedings, and give

the court jurisdiction to issue writs of arrest and commitment. *State v. Noyes*, 45.

See LARCENY; ROBBERY.

### INDORSEMENT.

See NEGOTIABLE INSTRUMENTS.

### INFANTS.

**A JUDGMENT IN A SUIT IN WHICH MINORS ARE PARTIES**, and in which they are not represented by their guardian, curator, or next friend as required by law, is not void if their father, who was their natural guardian, was also a party to such suit. *Brandon v. Carter*, 673.

See ADOPTIONS; GUARDIAN AND WARD; MUNICIPAL CORPORATIONS, 27; NEGLIGENCE, 4-7; RAILROADS, 23.

### INJUNCTIONS.

1. **STREETS—NUISANCE.—IRREPARABLE INJURY** as used in the law of injunction against obstructions in public streets does not necessarily mean that the injury complained of is beyond the possibility of compensation in damages, nor that it must be very great, and the fact that no actual damages can be proved, so that in an action at law a jury could award nominal damages only, is sufficient reason why a court of equity should interfere by injunction when the nuisance is continuous. *Field v. Barling*, 311.
2. **MUNICIPAL CORPORATIONS—STREETS—RIGHT OF LOT-OWNER TO LIGHT AND AIR—INJUNCTION TO PRESERVE.**—An owner of a lot fronting a dedicated city street is entitled to an injunction to restrain the erection of a bridge across the street when its erection would obstruct the free passage of light and air, and result in serious damage to such lot-owner, different in character from that sustained by the public, and although the complaint and prayer for injunction describes a bridge of certain dimensions, the lot-owner is entitled to a decree enjoining the construction of any bridge across the street, and not to a decree confined to the particular kind of bridge described. It is the duty of the court to render a decree which settles the controversy. *Field v. Barling*, 311.
3. **MUNICIPAL CORPORATIONS—JUDICIAL INTERFERENCE WITH LEGISLATION OF.**—If the legislative body of a municipality is about to pass some ordinance resolution, or order, the mere passage of which will immediately occasion or be immediately followed by some irreparable loss or injury beyond the power of redress by a subsequent judicial proceeding, an injunction is perhaps the proper remedy to prevent such loss or injury, but such interference cannot be justified except in extreme cases and under extraordinary circumstances. *Lewis v. Denver Water Works Co.*, 248.
4. **MUNICIPAL CORPORATIONS—JUDICIAL CONTROL OVER LEGISLATION OF.** An injunction restraining the board of trustees of an incorporated town from acting in its legislative capacity upon a matter clearly within the scope of the powers confided to it by the general laws of the state is an erroneous interference with its legislative functions, although the action sought to be restrained seeks to impair the obligation of a contract to which such board is a party. *Lewis v. Denver Water Works Co.*, 248.
5. **INJUNCTION TO PREVENT OVERFLOW OF LANDS—SUFFICIENCY OF COMPLAINT.**—An injunction lies to restrain a railroad company from construct

ing a culvert across a watercourse along its right of way, and from banking up such right of way on each side of the culvert, so that the waters of the stream cannot pass away except through the culvert, if it would be insufficient to carry off the waters of the stream during ordinarily heavy rains, thus causing the waters to be dammed up and to overflow plaintiff's lands, destroying his crops, fences, and other improvements, to his great, continuous, and irreparable injury from year to year. *Lake Erie etc. R. R. Co. v. Young*, 430.

6. **NUISANCE—RIGHT TO RELIEF BY INJUNCTION.**—The general rule, formerly enforced with strictness, that before a court of equity would interfere to restrain a private nuisance the complainant must establish his right in a court of law, has been somewhat relaxed, and when a case is so clear as to be free from any substantial doubt as to the right to relief, and the fact that a nuisance *per se* is sought to be created is evident, the rule will not be enforced. *Village of Dwight v. Hayes*, 367.
7. **WATERS—POLLUTION OF.**—An injunction will lie to restrain the pollution of the waters of a stream by emptying therein the sewage of a city, thereby rendering the waters unwholesome and unfit for use, and creating a private nuisance in the premises of a landowner over which the stream flows. Although such nuisance may cause inconsiderable damage, a court of equity will enjoin its continuance. Nor is the right to an injunction in such case affected by the fact that a large population will be thereby inconvenienced in the interruption of the use of a system of sewers. *Village of Dwight v. Hayes*, 367.
8. **RIGHT TO, HOW LOST.**—A person by remaining silent and inactive, and allowing acts to be done and expense to be incurred, may lose his remedy by injunction, and be compelled to assert his rights at law. *Barnard v. Sherley*, 454.
9. **MODIFICATION OF.**—A temporary injunction may be so modified as to protect the rights of all parties in interest. *Lake Erie etc. R. R. Co. v. Young*, 430.

See EQUITY.

#### IN PARI MATERIA.

See STATUTES, 6.

#### INSANE DELUSIONS.

See WILLS, 5, 6.

#### INSANE PERSONS.

1. **FORFEITURE AGAINST.**—After one has been adjudged a lunatic no forfeiture of his contract by reason of his failure to pay certain sums of money can be declared against him, unless done by decree of a court of competent jurisdiction, and the lunatic is properly represented by conservator or guardian. An attempted forfeiture, without such decree of court, will be regarded as fraudulent, and be set aside in a court of equity. *Helberg v. Schumann*, 339.
2. **CONTRACTS OF—FRAUD.**—Lunatics or insane persons are incapable, for want of capacity, to enter into a valid contract or do any valid act, and all persons dealing with them, with knowledge of their incapacity, are regarded as perpetrating a fraud upon them, and courts of equity will



set aside contracts made with such insane persons on the ground of fraud. *Hellerg v. Schumann*, 339.

See GUARDIAN AND WARD.

### INSOLVENCY.

**DISCHARGE AS BAR TO JUDGMENT ON ASSIGNED CLAIM.**—A discharge in insolvency is a bar to an action against the insolvent on a judgment recovered by an assignee in his own name on notes held by a firm residing outside the state and assigned to such assignee for collection in his own name for the benefit of the firm. *French v. Robinson*, 533.

### INSTRUCTIONS.

See APPEAL, 13-15; TRIAL, 7, 8.

### INSURANCE.

1. **INSURABLE INTEREST.**—M. and B. were engaged in the grain business, and the elevator where the business was transacted, and the ground upon which it was located, were owned by M. B. advanced no money to carry on the business, but, under an arrangement with M., was to have charge of the business at the elevator, and receive one-half of the profits as a salary. In such case B's liability with M. to the owners of grain stored in the elevator to hold and ship the grain to them or their order, as provided in the warehouse receipts, and his right to share in the profits in payment of his salary, constitute an insurable interest in the property, upon which he could take out a policy for his own benefit. *Traders' Ins. Co. v. Pacaud*, 355.
2. **DISCLOSURE OF INTEREST.**—A policy of insurance was issued to M., of the firm of M. and B., loss payable to P. and Co., as their interest might appear, and conditioned that "if the interest of the assured in the personal property be other than its unencumbered and sole ownership, without such fact being indorsed upon the policy, the same shall be void." The property was stored with the firm of M. and B., warehousemen, B. having no title to the property, but only an interest in the profits of the business of buying and storing grain, and being liable with M. to hold and ship the grain, as provided in the warehouse receipts issued by the firm. It was held in such case that although B. had an insurable interest in the grain stored, his interest was not one which the assured were required to disclose in taking out the policy to protect their own interest. *Traders' Ins. Co. v. Pacaud*, 355.
3. **PROVISION FOR APPORTIONMENT OF LOSS.**—A provision in a policy of insurance that in case of any other insurance upon the property insured, made prior or subsequent to the policy, the assured shall be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured therein, applies only to cases where the insurance covers the same interests, and can have no application to insurance obtained upon another distinct insurable interest in the property. *Traders' Ins. Co. v. Pacaud*, 355.
4. **CONDITION AGAINST ALLOWING PREMISES TO BECOME VACANT.**—If a tenant of the insured occupies the insured premises until one day before they are destroyed by fire, when he partially moves out, leaving a part of his furniture in the building, the premises are not vacant and unoccupied within the meaning of a policy which becomes void if the insured property becomes vacant and unoccupied during the term of

the insurance, without notice to and the written consent of the insurer. *Liverpool etc. Ins. Co. v. Buckstaff*, 724.

5. **RIGHT OF ACTION ON POLICY.**—Where a party contracts for the insurance of property, and pays the premium, and the loss is made payable to him, the agreement to pay the loss is a contract with the person who pays the consideration, and he has a right of action in his own name for the loss, although the insurance is in the name of another. *Travellers' Ins. Co. v. Pacaud*, 355.
6. **LIMITATION OF TIME TO COMMENCE ACTION.**—Under a policy of insurance providing that no action shall be maintained thereon unless brought within six months after the loss, which shall not become payable until sixty days after proofs thereof are received by the company, the limitation commences to run only from the time the loss is due and payable, and suit may be brought within six months from the expiration of the sixty days. *Fireman's Fund Ins. Co. v. Buckstaff*, 727.
7. **LIFE—INSURABLE INTEREST.**—A young woman in whom an elderly man had taken an interest so far as to provide her with means to obtain an education, and also to give her employment, and who, from his conduct and expressions of intention, had a right to expect him to continue his *quasi* parental care towards her, has an insurable interest in his life, and therefore an assignment by him to her of a policy which he had effected on his life is valid and enforceable. *Carpenter v. United States etc. Ins. Co.*, 880.
8. **LIFE.—TO CREATE AN INSURABLE INTEREST IN THE LIFE OF ANOTHER KINSHIP** is not necessary. It is sufficient if the relationship between the insurer and the beneficiary is one of mere friendship, if the circumstances show that the loss of the life of the former will result in pecuniary loss to the latter. *Carpenter v. United States etc. Ins. Co.*, 880.
9. **MUTUAL BENEFIT ASSOCIATION—CHANGE OF BENEFICIARY.**—Upon the return and surrender by a member of a mutual benefit association of his certificate, "for the purpose of securing a change of beneficiary," he directed the new certificate to be made payable to such person or persons as he should designate and name in his last will and testament. The new certificate was issued accordingly, but no person was ever named or designated as such beneficiary by last will, or otherwise. It was held that the attempted change of beneficiaries was incomplete, and hence ineffectual, and that the contract of insurance must be regarded as though the former certificate had never been returned and surrendered. *Grace v. Northwestern etc. Relief Assn.*, 62.

See TAXES, 3.

## INTEREST.

See APPEAL, 7; INSURANCE, 1-3, 7, 8; RECEIVERS, 6.

## INTERSTATE COMMERCE.

1. **CONSTITUTIONAL LAW—REGULATION OF INTERSTATE COMMERCE.**—A state cannot invade the domain of the national government, or assume powers properly belonging to Congress, and in relation to the subject of commerce including interstate passenger travel the state cannot place any obstacle in the way of such travel, or impose any burden upon it; but many acts of a state may affect or influence commerce without amounting to a regulation of it. *Burdick v. People*, 329.

2. **CONSTITUTIONAL LAW—POLICE POWER.**—The deposit in Congress of the power to regulate commerce between the states is not intended to rob the latter of their police power. Under such power they may legislate to promote domestic morals, order, and safety, to secure general comfort, health, and prosperity, to prevent crime, pauperism, disturbance of the peace, and all forms of social evils, and to protect the lives, limbs, quiet, and property of all their citizens. *Burdick v. People*, 329.
3. **CONSTITUTIONAL LAW—POLICE POWER.**—State legislation which is not an obstacle to interstate commerce, and imposes no burden upon it, and which comes within a proper exercise of the police power, is not unconstitutional as infringing upon the power of Congress. *Burdick v. People*, 329.

See RAILROADS, 11.

### INTOXICATING LIQUORS.

See MUNICIPAL CORPORATIONS, 24-28.

### INVENTORY.

See RECEIVERS, 4; SALES, 3.

### JOINT TENANCY.

See HUSBAND AND WIFE, 3, 4.

### JUDGMENTS.

1. **INTERLOCUTORY ORDERS OR FINDINGS** in a pending suit in equity in a federal court is not such final determination of the rights of the parties as to bar litigation of the same matters in a state court. *Kilpatrick v. Kansas City etc. R. R. Co.*, 741.
2. **JURISDICTION—IRREGULARITY AS AFFECTING JUDGMENT.**—Jurisdiction of the parties and subject matter having been obtained, any irregularity in the action of the court, however gross, does not render its judgment a nullity. *Ferguson v. Oliver*, 593.
3. **JURISDICTION, EVIDENCE ATTACKING.**—If a judgment is entered against J. N. upon the personal service of process upon him in a suit against P. J. N. he is not entitled in an action upon such judgment to attack the jurisdiction of the court by proving that the note sued upon, and for which judgment was rendered, was executed by P. J. N. and not by J. N., upon whom process was served and against whom the judgment was entered. *Foshier v. Narver*, 874.
4. **NOTICE—JUDGMENT LIENS.**—The docket of a judgment, in order to operate as constructive notice, must contain all the essential matters required by law. And where the statute relative to the docketing of judgments requires the entry upon the book of "the name at length of each judgment debtor," the docket entry of a judgment against Edward Davis is not constructive notice of a lien on the real estate of either E. A. Davis or Edward A. Davis. *Davis v. Steeps*, 51.
5. **JUDGMENT OF SISTER STATES.**—THE JURISDICTION of a court of a sister state to render a judgment which is sought to be enforced in this state may be here inquired into. The defendant is entitled to show that he was not in fact served with process, and, as a consequence, that the court never acquired jurisdiction over him. *Foshier v. Narver*, 874.
6. **JUDGMENT OF SISTER STATE, SERVICE ON DEFENDANT BY WRONG NAME.** If process is served on the defendant personally, the fact that he was

therein designated by an incorrect name, as where his name was J. N. and he was designated as P. J. N., such service is valid, and supports a judgment based thereon, and such judgment cannot be collaterally attacked by proving that the person named in the process as defendant was not the person on whom it was in fact served. If the person served failed to appear and show that the plaintiff was not entitled to relief against him because he was the wrong party and not liable, the judgment establishes the fact that he was the right party and that the plaintiffs were entitled to relief against him. *Foshier v. Narver*, 874.

See ADOPTION, 1; GUARDIAN AND WARD; INFANTS; JUSTICES OF THE PEACE, 2; PRIVATE WAYS, 1; SHERIFFS.

### JUDICIAL NOTICE.

See EVIDENCE, 2.

### JURISDICTION.

1. JURISDICTION, EXTRINSIC EVIDENCE IN SUPPORT OF.—Facts necessary to show that a court or board of limited or special jurisdiction has acted within its jurisdiction may be proved by other competent evidence in the absence of a statute requiring such facts to appear in the minutes or other records of its proceedings. *In re Williams*, 163.
2. WHEN CONCURRENT.—A statutory jurisdiction or remedy does not extinguish the ancient jurisdiction of the courts of equity over the same subject. *Brandon v. Carter*, 673.
3. MORTGAGES—FORECLOSURE—JURISDICTION OVER LAND IN ANOTHER STATE.—A court of chancery having jurisdiction of the parties has power to make a decree compelling a mortgagor to convey the mortgaged premises, situate in another state, to the mortgagee, after his failure to pay the amount ascertained to be due upon foreclosure within the time fixed by the decree. But the court should not exercise this power except under unusual and extraordinary circumstances, and when it is necessary in order to prevent loss or to protect the rights of the mortgagee; in all other cases he should be required to resort to the remedies of the courts of the jurisdiction in which the land is situated. *Eaton v. McCall*, 561.
4. GENERAL APPEARANCE—DISMISSAL OF DEFENSE.—A general appearance, without personal service, by a defendant in an action against him in a court having jurisdiction of the subject matter, confers jurisdiction of his person, and the fact that the court strikes out his answer or defense as insufficient does not deprive it of jurisdiction, nor invalidate its judgment. *Ferguson v. Oliver*, 593.
5. APPEARANCE IN FOREIGN COURT.—A general appearance without personal service by a defendant residing in one state, in an action against him in the court of another state or country having general jurisdiction of the subject matter, confers jurisdiction of his person. He cannot afterwards question the jurisdiction when a judgment based upon such appearance is in question. *Ferguson v. Oliver*, 593.
6. THE JURISDICTION OF THE PROBATE COURT USUALLY TERMINATES upon the entry of a decree of distribution, naming the persons entitled to the property held by the decedent, and the share of each. *Buckley v. Superior Court*, 135.
7. PROBATE JURISDICTION—QUESTIONS OF TITLE.—The superior court while sitting as a court of probate has no other powers than those given it by the statute, and such incidental powers as pertain to it for the purpose

of enabling it to exercise the jurisdiction conferred upon it. It cannot determine disputes between heirs or devisees and strangers as to the title to the property. *Buckley v. Superior Court*, 135.

See ADMIRALTY; COURTS, 3-6; HABEAS CORPUS; JUDGMENTS, 2, 3, 5; PARTITION, 3; SHIPPING, 1; STATUTE, 2.

## JURY.

See APPEAL, 16.

## JURY TRIAL.

See TRIAL.

## JUSTICES OF THE PEACE.

1. JURISDICTION.—A statute providing that if the wages of a discharged employee are not paid him on the day of his discharge, then, as a penalty for nonpayment, such wages shall continue at the same rate until paid, means that the additional sum shall accrue as compensation for delay, and punishment in exemplary damages for failure to pay, and gives a justice of the peace jurisdiction of an action to recover the amount due under the statute to a discharged employee. *Leop v. St. Louis etc. Ry. Co.*, 109.
2. JUSTICE'S JUDGMENTS ARE ONLY PRIMA FACIE EVIDENCE OF JURISDICTION, in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy, nor over the parties to the action. *Townsend-Myrick Dry Goods Co. v. Fuller*, 97.

See PROCESS.

## JUSTIFICATION.

See LIBEL, 3, 7; SHERIFFS.

## KNOWLEDGE.

See MASTER AND SERVANT, 3, 4.

## LACHES.

See INJUNCTIONS, 8; PRIVATE WAYS, 5.

## LANDLORD AND TENANT.

**MINING LANDS—CONSTRUCTION OF LEASE—ROYALTIES.**—A lease of coal lands conferring mining rights and fixing the royalty to be paid for coal taken out also provided that, until the mines should be opened, the lessee, or its successor or assigns, should pay on the first day of January to the lessor, or those succeeding to his rights, one dollar per acre of the tract leased. It was held that, under the terms of this lease, the one dollar per acre should be treated as the annual rental for lands, and not mines, and that the widow of the lessor was entitled to such rental after the assignment of her dower and until the opening of mines, if any were opened on her lands, after which she should receive the royalty fixed in the lease. *Priddy v. Griffith*, 397.

**LARCENY.**

**INDICTMENT—ALLEGATION OF VALUE.**—Indictments for larceny must state the value of the property alleged to have been stolen only when the punishment is graduated with reference to its value. *State v. Perley*, 564.  
See **ROBBERY**, 2.

**LEASE.**

See **DOWER**, 3; **LANDLORD AND TENANT**.

**LEGACIES.**

1. **WHEN GENERAL AND WHEN SPECIFIC.**—A bequest of a specified amount in public funds, or stock, or money is general, but further describing the property as being then owned by the testator, or particularly describing property embodied in the bequest and owned by the testator at the time of his death, is special and specific. *Evans v. Hunter*, 503.
2. **WHEN GENERAL.**—A bequest of four thousand dollars in United States government bonds, without any designation of the source from which they are to be obtained, is general, and may be satisfied by delivering to the legatee any bonds of the kind named in the amount specified, although the testator is possessed of the required amount of such bonds at the time of his death. *Evans v. Hunter*, 503.
3. **LEGACIES WHEN SPECIFIC ARE NOT SUBJECT TO CONTRIBUTE** to any deficiency occurring in other bequests, nor can a specific legatee claim to have any deficiency which may be found to exist in his legacy made up from other portions of the estate. *Evans v. Hunter*, 503.

**LEGISLATURE.**

**CONSTITUTIONAL LAW—RULES OF EVIDENCE SUBJECT TO LEGISLATIVE CONTROL.**—No person or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legislature, whether affecting proof of existing rights or rights subsequently acquired, and changes in them may be made applicable to existing causes of action. *Chicago etc. R. R. Co. v. Jones*, 278.

See **CONTRACTS**, 6-10; **CORPORATIONS**, 4, 5; **EASEMENTS**, 2; **EMINENT DOMAIN**, 2, 4, 6; **MILLS**; **MUNICIPAL CORPORATIONS**, 4, 6, 10, 11; **OFFICERS**, 8-10, 12, 19; **RAILROADS**, 3, 8, 11; **STATUTES**, 6.

**LETTERS.**

See **AGENCY**, 1, 3.

**LIBEL.**

1. **FROM A LIBELOUS PUBLICATION THE LAW IMPLIES MALICE, AND INFERS DAMAGE** if the publication is false, except in the case of privileged communications. *Upton v. Hume*, 863.
2. **PRIVILEGED COMMUNICATIONS DEFINED.**—A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contains criminating matter which, without this privilege, would be actionable, and this though the duty is not a legal one, but only a moral or social duty of imperfect obligation. *Upton v. Hume*, 863.

2. **IN A LIBELIOUS PUBLICATION THE TRUTH OF A LIBELIOUS PUBLICATION,** and in this respect is determined by the evidence, the jury should not be instructed that they may consider this as a mitigation of the publication of the original charge, and in aggravation of damages and in evidence of malice, if the statute of the state provides that the defendant may in his answer allege both the truth of the matter charged, and any mitigating circumstances to reduce the damages, and whether he proves the justification or not, may give in evidence the mitigating circumstances. The jury should consider whether the justification was pleaded in good faith or merely for the purpose of reducing the false charge. If not the latter purpose the plea may be regarded as an aggravation of damages and in evidence of malice, but the jury will be to make out the plea if it is true and not of itself evidence of malice, nor does it aggravate damages or reduce the jury from mitigating damages if they believe the defendant was free of malice, and had good reason to believe the plea he published was true. *Upton v. Feltz*, 863.
3. **EVIDENCE OF OTHER LIBELS OR SLANDERS CHARGES** may be given in the case where they impact the same crime, and may fairly be considered as a branch of the original charge, as tending to show express malice, and to increase the damages, but evidence cannot be received of libels and slanders spoken or published on another occasion charging a different crime than that charged in the complaint, for the purpose of showing malice, nor for any other purpose. *Upton v. Hunt*, 863.
4. **NEWSPAPER LIBEL.**—THE PUBLICATION OF A CANDIDATE FOR OFFICE that he is a perjured man, and was by his false swearing deceived the court, is not privileged either actually or constitutionally. *Upton v. Hunt*, 863.
5. **NEWSPAPER LIBEL.**—THE PUBLICATION OF THE PRESS guaranteed by the constitution does not confer upon proprietors of newspapers the right to publish with impunity charges for which others would be responsible. They are subject to the law of the land, and, when they are guilty of a false and defamatory publication, must answer in damages to the injured party. *Upton v. Hunt*, 863.
6. **NEWSPAPER LIBEL.**—THE REPETITION OF LIBELOUS MATTER by one newspaper copied from another does not constitute any justification, even though done in good faith with an honest belief in its truth, and for the purpose of influencing voters. That the libel was a repetition, instead of being an original libel, may be considered in connection with other circumstances in determining the good faith of the defendant and as tending to show want of actual malice, and thus mitigating damages. *Upton v. Hunt*, 863.
7. **CANDIDATE FOR OFFICE.**—It is both the privilege and the duty of the public press to discuss before the people the fitness and qualification of candidates for public office. Such a candidate puts his character in issue so far as respects such fitness and qualification. *Upton v. Hunt*, 863.
8. **CANDIDATE IMPUTING CRIME TO.**—A newspaper publication imputing to a candidate for office the commission of a crime, merely because he is seeking the office, is not privileged, and is actionable per se, the law imputing malice to the author and publisher. A publication attacking the private character of a candidate by falsely imputing to him a crime is not privileged by the occasion, and it is no justification that the publication was made with an honest belief in its truth, in good faith, and for the purpose of influencing voters. *Upton v. Hunt*, 863.



## LIEN.

**LIEN OF MATERIALMAN, CONTRACTOR CANNOT AVOID OR WAIVE.**—If a state statute gives a lien against vessels for all debts of persons by virtue of contracts, express or implied, with the owners of such vessels or with the agents, contractors, or subcontractors, of such owner, or any of them, on account of labor done or materials furnished in the building of such vessel, such lien in favor of a materialman cannot be waived or destroyed by the contractor to whom he furnished the materials, nor by the payment to the contractor of the entire sum to which he was entitled by the terms of his contract for building such vessel. *The Victorian*, 838.

See ADMIRALTY; BARKS; JUDGMENTS, 4; MECHANICS' LIENS; RECEIVERS, 5; SHIPPING, 1.

## LIMITATION OF ACTIONS.

1. **PLEADING.**—When an amendment to a declaration sets up no new matter or claim, but merely restates in a different form the cause of action set out in the original declaration, it relates back to the commencement of the suit, and the statute of limitations is arrested at that point. When the amendment introduces a new or different cause of action it is treated as a new suit begun at the time when such amendment is filed. *Chicago etc. R. R. Co. v. Jones*, 278.
2. **AMENDED PLEADING.**—When an original declaration against a railroad company sought to recover treble damages allowed by statute for a violation of its provisions, and an amended declaration to recover damages against the same company in the same suit for a violation of its common-law liability in charging unreasonable rates is filed after the lapse of more than the period of the statute of limitations from the time of filing the original declaration, a new cause of action is set up, and the statute of limitations applies to the amendment. *Chicago etc. R. R. Co. v. Jones*, 278.
3. **AMENDED PLEADINGS.**—Although an amendment to a declaration may properly be allowed, it does not necessarily follow that, when allowed, it relates back to the date of bringing the suit, for the purpose of determining questions of limitation. An amendment introducing a new cause of action barred by limitation is ineffectual to avoid the statutory bar. *Chicago etc. R. R. Co. v. Jones*, 278.
4. **AMENDED PLEADINGS.**—When the original declaration in an action against a carrier sets up overcharges on certain shipments of freight, and the amended declaration sets up such overcharges on other and different shipments, the causes of action are not the same, and the statute of limitations applies to the amendment. *Chicago etc. R. R. Co. v. Jones*, 278.
5. **RUNNING ACCOUNT.**—If a statute provides that all actions against a boat or vessel to enforce a lien for materials furnished in its construction shall be commenced within one year after the cause of action accrues, and the materials are furnished under circumstances which indicate a running account during the process of the building of the boat, the transaction is regarded as a single one, and the action may be sustained if commenced within a year after furnishing the last item, though other items were sold and delivered more than a year before the action was brought. *The Victorian*, 838.

6. **DAMAGES FROM OVERFLOW OF LANDS.**—When the first overflow of lands, arising from the negligent discharge of surface water thereon, which causes damage, furnishes a basis or substantial basis from which future damage—arising from year to year from the same cause can be calculated, the right of action is not barred by limitation, though each first overflow occurred more than five years prior to the commencement of suit. *Mont v. American Ry. Co.*, 473.

See **INUNDATION**, 6.

### **LIVERY STABLES.**

See **MUTUAL CORPORATION**, 10, 11; **MURDER**, 1.

### **LIVESTOCK.**

See **CARRIERS**, 5, 6.

### **LUNATICS.**

See **INSANE PERSONS**.

### **MALICE.**

See **LIAR**, 1, 2, 4.

### **MANDAMUS.**

1. **MANDAMUS COMPULSIVE** issue to COMPEL THE GOVERNOR of a state to perform any official duty whatever imposed on him as such officer, whether political or merely ministerial. The fact that he has voluntarily submitted himself to the jurisdiction of the court is immaterial. *State v. Stone*, 785.
2. **TELEPHONE COMPANY.**—Writ of mandamus will issue in a proper case, as remedy of a telephone company, to compel a street railway company to place ground wires above its trolley wires at crossings of the latter with the telephone wires, as required by the provisions of a city ordinance regulating the stringing of wires in the city. *State v. Jewettville etc. Ry. Co.*, 22.

See **ACTUAL**, 4.

### **MARITIME CONTRACTS.**

See **SHIPPING**.

### **MARRIAGE.**

See **DEEDS**, 4, 5.

### **MARRIAGE AND DIVORCE.**

1. **EVIDENCE.—DECREE OF DIVORCE** is not evidence in another suit except in a case in which the same parties, or their privies, are litigating in regard to the same subject of controversy. *Bellamy v. Stewart*, 722.
2. **EVIDENCE.—DECREE OF DIVORCE.**—In an action by a third person against a husband to recover for necessities furnished his wife while living apart from him a judgment granting the wife a decree of divorce on the ground of her husband's cruelty is not admissible to show that she was justified in living apart from him, and therefore carried his credit with her. *Bellamy v. Stewart*, 722.

See **ABDUCTION**, 7.

**MARRIED WOMEN.**

See PARTITION, 1.

**MASTER AND SERVANT.**

1. **CONTRACT FOR SERVICES.**—The relation of master and servant, or an express contract to compensate a relative for services rendered, may be established as fairly and fully by circumstantial evidence as by that which is direct. *Estate of Kessler*, 74.
2. **PLEADING QUANTUM MERUIT.**—A complaint which alleges a contract of employment between the plaintiff and the defendant, and the rendering of services and the expenditure of money under it, and that the plaintiff was wrongfully discharged, and the value of his services rendered, and the amount of his money expended, presents a cause of action in *quantum meruit*. *Glover v. Henderson*, 695.
3. **NOTICE OF REPUTATION OF SERVANT.**—A master is charged with knowledge of the general reputation of his servant for recklessness and unfitness for his position when such reputation is generally and commonly known, and he has held such position for a number of years. *St. Louis etc. Ry. Co. v. Hockett*, 105.
4. **NEGLIGENCE—DEFECTIVE APPLIANCES—PLEADING.**—In an action by a servant against his master to recover for personal injuries received through the negligence of the latter in furnishing defective appliances, it is unnecessary for the servant to plead and prove want of knowledge of such defect. Such knowledge is matter of defense which, to admit proof, must be pleaded. *Union Stockyards Co. v. Conoyer*, 738.
5. **OFFICER OF LAW AS PRIVATE WATCHMAN.**—A officer of the law cannot engage as such to guard the property of a private individual or corporation, and the latter cannot escape liability for his wrongful act, while acting as its night watchman, on the ground that he is such officer. *St. Louis etc. Ry. Co. v. Hockett*, 105.
6. **VICE-PRINCIPALS.**—A person employed by a master and given power to superintend, control, and direct other employees engaged in the performance of certain work for the master, is, as to the men under him, a vice-principal, whatever he may be called. *Boyd v. St. Louis etc. Ry. Co.*, 85.

See JUSTICE OF THE PEACE, 1; RAILROADS, 2, 20-23; SERVICES; STATUTES, 18; THEATERS.

**MATERIALMEN.**

See LIENS.

**MECHANICS' LIENS.**

1. **VENDOR'S LIEN—PRIORITIES—EVIDENCE.**—Under an executory contract for the sale of a lot, and a contemporaneous joint arrangement between vendor and vendee, whereby a building is to erected on the lot from the proceeds of a loan thereon, obtained by the vendee, and, out of the proceeds of the same loan, the vendor is to receive the purchase money, mechanics' liens for improvements erected on the lot by the vendee are prior and superior to the vendor's lien for the unpaid purchase money, and, although such joint arrangement does not appear in the contract of sale, it may be established by parol evidence. *Sheehy v. Fulton*, 767.
2. **MORTGAGE—PRIORITIES.**—An investment company which furnishes the money for the construction of a railroad, taking the notes of the persons

proposing to build it, guaranteed by an existing railroad company controlled by them, and to be secured by a mortgage to be executed by the proposed railroad company when incorporated, is to be regarded as a promoter and builder of the road, and is not entitled to have the mortgage declared a lien upon the franchises and property of the road constructed, superior to mechanics' liens arising out of its construction, when at the date of the execution and delivery of the mortgage the proposed railroad company has acquired no right of way or franchises, and has taken no steps toward their acquisition further than filing its articles of incorporation and naming its officers and directors, and the money has been paid over to the individual contracting parties then officers of the corporation, to be expended by them in the construction of the road, and the contracts for labor and material have been made by them in the name of the company. *Kilpatrick v. Kansas City etc. R. R. Co.*, 741.

2. **WAIVER BY TAKING COLLATERAL SECURITY.**—Waiver of a mechanic's lien is not inferred from the taking of collateral security from another, in a manner not inconsistent with the continued existence of the lien. *Kilpatrick v. Kansas City etc. R. R. Co.*, 741.

### MENTAL ANGUISH

See DAMAGES, 2; TELEGRAPH COMPANIES, 3, 4.

### MILLS

1. **TOOL FOR GRINDING GRAIN—USURY.**—The owner and operator of a public gristmill is bound to receive all grists of grain tendered to be ground, and to grind for the toll specified by statute. Any agreement for toll in excess of that fixed by the statute is usurious and void. *State v. Edwards*, 528.
2. **CONSTITUTIONAL LAW—REGULATION OF PUBLIC GRISTMILLS.**—An owner of a gristmill who makes his mill public, and assumes to serve the public, thereby dedicates his mill to public use, and it becomes subject to legislative regulation and control so long as it remains public. *State v. Edwards*, 528.
3. **CONSTITUTIONAL LAW.**—REGULATION OF PUBLIC GRISTMILLS is within the legislative power. A statute specifying the amount of toll that may be charged for grinding grain at such mills is constitutional and valid. *State v. Edwards*, 528.

### MINES

See DOWER; LANDLORD AND TENANT.

### MINORS

See INFANT.

### MISTAKE

**WRITING SIGNED WITHOUT READING.**—One who has signed a written instrument, without being induced thereto through any fraud or deception, cannot avoid its effect on the ground that at the time he signed the paper he did not read it or know its contents. And the fact that the party could not read English or understand the contents of the paper signed is no excuse. *Albrecht v. Miksanter etc. Ry. Co.*, 32.

See NOTICE, 1.

## MODIFICATION.

See INJUNCTIONS, 2.

## MORTGAGES.

1. **NATURE OF DEBT SECURED BY.**—There can be no mortgage without a debt, to secure which the mortgage is given, but there need be no express promise by the mortgagor to pay the debt. The court may imply the promise from the transaction, and where one person, for his own protection, assumes the debt of another, the indebtedness of the latter to the former is such as may properly be secured by mortgage. *Helberg v. Schumann*, 339.
  2. **DEED ABSOLUTE IN FORM—EVIDENCE.**—A deed absolute on its face may be shown, by parol, to have been executed for the payment of money; if so it will be treated in equity as a mortgage. Resort may be had to parol evidence in such case, to establish the intention of the parties from their declarations and statements at the time the arrangement was consummated, and the rule that the terms and conditions of a written contract cannot be varied by parol does not apply. *Helberg v. Schumann*, 339.
- See ACKNOWLEDGMENT; JURISDICTION, 3; MECHANICS' LIENS, 2; NOTICE, 1; SHERIFFS, 2.

## MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—The term "township," within the meaning of a constitutional provision prohibiting special legislation regulating county and township affairs, refers to an involuntary corporation or *quasi* corporation, as a subdivision of a county, and not to a voluntary municipal corporation, such as a city or town. Special legislation is not prohibited in respect to the latter except when a general law can be made applicable. *Mayor v. Shattuck*, 208.
2. **JUDICIAL CONTROL OVER LEGISLATION OF.**—Each department of state government is independent within its appropriate sphere, the judicial department having no direct control over the legislature. This principle extends to the local legislative bodies of municipal corporations. *Lewis v. Denver Water Works Co.*, 248.
3. **JUDICIAL CONTROL OVER LEGISLATION OF.**—A city council or board of trustees of an incorporated town or city, when acting, or professing to act, in a legislative capacity upon a subject within the scope of its powers as conferred by its charter or by the general laws of the state, is entitled to immunity from judicial interference. *Lewis v. Denver Water Works Co.*, 248.
4. **CONSTITUTIONAL LAW—LEGISLATIVE POWERS OVER MUNICIPAL CORPORATIONS.**—The legislature, as a general rule, has plenary power in respect to municipal corporations. The courts uphold legislative acts relating thereto, unless their unconstitutionality is clearly and palpably apparent. *Mayor v. Shattuck*, 208.
5. **ANNEXATION—CONSTITUTIONAL LAW.**—A statute whereby one municipal corporation becomes annexed to another, forming a consolidated municipality, the survivor assuming all the debts and taking all the corporate property of the annexed municipality, together with authority to levy and collect taxes throughout the enlarged municipality, is not an act retrospective in its operation; nor does it impose on the people



15. **MUNICIPAL ORDINANCES MAY BE DECLARED VOID BY THE COURTS** on ground, that they are unreasonable. *City of Tokio v. Cook*, 678.
16. **MUNICIPAL ORDINANCE, VOID IN PART.**—A municipal ordinance having provisions, some of which are constitutional and others not, may be enforced as to the parts not in conflict with the organic law. *City of Tokio v. Cook*, 678.
17. **MUNICIPAL ORDINANCES.**—A CONSTITUTIONAL PROVISION THAT NO BILL SHALL CONTAIN MORE THAN ONE SUBJECT, which shall be clearly expressed in its title, has no application to municipal ordinances. *City of Tokio v. Cook*, 678.
18. **MUNICIPAL ORDINANCE THE ENACTING CLAUSE OF WHICH DOES NOT CONFORM TO THE REQUIREMENTS OF THE STATUTE** is not for that reason void. *City of Tokio v. Cook*, 678.
19. **A GRANT OF POWER** to a municipality to regulate lawful occupations and business places is not an express grant of power to locate or prescribe the limits of carrying on lawful occupation upon private premises. Nor does a grant of power to regulate and prevent the carrying on of business dangerous or detrimental to public health, and to declare, prevent, or abate nuisances, vest in the city council authority to prohibit at their discretion well constructed, regulated, and conducted occupations, such as livery-stables; nor does a general welfare clause in a grant of power confer full and specific power upon the city council for such purpose. *Phillips v. Denver*, 230.
20. **PROHIBITIVE ORDINANCES** not criminal, but highly penal in their nature, are invalid, unless free from legal and constitutional objection, and cannot be permitted to prejudice the rights and privileges of the citizen in respect to the use and enjoyment of his private property. *Phillips v. Denver*, 230.
21. **UNREASONABLE\* ORDINANCE.**—An ordinance prohibiting the location of a livery-stable in any city block in which a school-building is situated, or in any block opposite to a block in which a school-building is situated without regard to the manner in which such stable is constructed, kept, or used, and without specifying the distance from a school-building within which a livery-stable may be conducted, is unreasonable and void, and cannot be considered as valid under a general or incidental grant of power to the municipality assuming to enact it. *Phillips v. Denver*, 230.
22. **A MUNICIPAL ORDINANCE REQUIRING THE CONSENT OF CERTAIN INDIVIDUALS** to the exercise of a specified business is void, though the municipality had power to regulate such business. Hence, an ordinance is invalid which purports to make it unlawful to operate a slaughter-house within a distance of two hundred feet of any dwelling-house without the consent of the owner and occupant of every such house. *St. Louis v. Howard*, 630.
23. **SLAUGHTER-HOUSES.**—A statute authorizing a city to provide for the erection, management, and regulation of slaughter-houses empowers it to forbid the operation of such houses within designated limits, except under certain specified conditions. *St. Louis v. Howard*, 630.
24. **CONSTITUTIONAL LAW—DISCRIMINATION BETWEEN PERSONS AND CLASSES.** An ordinance is not void because of its discrimination between different classes of persons if it affects all persons of certain classes and as to them acts uniformly. Therefore, a municipal ordinance may prescribe that a license to sell liquor shall not be granted except upon certain



- conditions specified therein, and that persons who have been, or shall thereafter be, guilty of certain acts shall be excluded from the benefit of the ordinance if the acts so specified are such as probably render persons seeking the license unfit to exercise the privileges conferred by it. *Poster v. Police Commr.*, 194.
24. **ORDINANCE, EX POST FACTO OPERATION OF.**—An ordinance respecting the licensing of saloons disqualifying any person from receiving such license who has carried on the business of selling or furnishing liquor in any place where females are suffered or procured to wait or attend in any manner on any person, and where also any musical, theatrical, or other public exhibition or performance was exhibited or performed, is not void as an *ex post facto* law. Therefore such license may be refused to a person who has been guilty of the acts specified, though they were not crimes nor disqualifications when committed, and though he agrees not to permit similar acts during the period for which the license is sought. The ordinance is not intended to punish crime, but merely to exclude persons from its benefit whose past conduct shows they are unfit to receive it. *Poster v. Police Commr.*, 194.
25. **POWER TO REGULATE LIQUOR TRAFFIC.**—Municipal authorities of incorporated towns and cities may be invested with power to license, regulate, prohibit, or suppress, within their limits, the traffic in intoxicating liquors, subject to the general laws of the state; and under such power they may permit such traffic in one part of the city and prohibit it in another part. *Meyer v. Shattuck*, 308.
26. **A MUNICIPAL ORDINANCE FORBIDDING ANY MINOR TO ENTER A BAR-ROOM,** unless as the agent or servant of his parent or guardian, is valid if the municipality enacting it had by statute been given power to make such rules and regulations for the better government of the town as its own lawmakers might deem necessary, not inconsistent with the laws of the land. *State v. Augusta*, 517.
27. **MUNICIPAL ORDINANCES—WHEN UNREASONABLE.**—A municipal ordinance requiring the removal from the doors and windows of saloons for the sale of intoxicating liquors of all screens and other obstructions to the view of the interior of, and the business transacted within, such saloons is void, as unreasonable, prohibitive of lawful business, and not in the line of regulation. *Stoff v. Newer City*, 436.
28. **ORDINANCES—KEEPERS OF BILLIARD-TABLES** are not recognized by the statute as exercising a special occupation, and each municipality may therefore determine for itself to what regulations they shall be subjected. Therefore, an ordinance providing that billiard-halls shall not be kept open after nine o'clock at night is valid. *City of Tarkio v. Cook*, 678.
29. **A MUNICIPAL ORDINANCE PROVIDING THAT NO BILLIARD-HALL SHALL BE KEPT OPEN,** nor shall any tables therein be used for playing games thereon after nine o'clock in the evening, is valid, if by statute the municipality enacting it has been given power to pass such ordinances as may be expedient to maintain peace and good government, and the good health and welfare of the city, and to regulate billiard-tables on which games are played for amusement. *City of Tarkio v. Cook*, 678.
30. **ELECTRIC WIRES.**—Municipal corporations have authority to make all reasonable regulations for the location and use of electric wires in the streets, and to require all reasonable safeguards to secure the safety

and convenience of the public in the lawful use of the street and the transaction of business. *State v. Janesville etc. Ry. Co.*, 23.

32. **VALIDITY OF ORDINANCE.**—An ordinance to regulate the stringing of wires in a city, and which provides that “whenever it shall be necessary to cross the line of any existing electric light, electric power, telegraph, or telephone line or lines . . . the person or company making such crossing shall supply all necessary safeguards for the same,” is reasonable, and is clearly sustained under the police power of the city. Nor is such ordinance retroactive in any sense because it requires safeguards for crossings which existed at the time of its passage. *State v. Janesville etc. Ry. Co.*, 23.
33. **PENALTIES WHICH MAY IMPOSE.**—Under a statute authorizing a city to pass ordinances for enforcing its police regulations, by imposing a fine not exceeding one hundred dollars for each violation, an ordinance imposing a fine of not less than thirty-five dollars nor more than one hundred dollars, is within the limits of the authority thus conferred. *City of Tarkio v. Cook*, 678.
34. **CRIMES, POWER TO PROVIDE FOR PUNISHMENT OF.**—Though an act is made criminal, and punishable by the laws of the state, a municipality may also make it punishable, and authorize proceedings for the imposition of such punishment. *State v. Walbridge*, 663.
35. **STREETS.**—**STATUTORY DEDICATION** of streets and alleys to a city by the owner of land vests the fee thereto in the city in trust for the public use, and for no other purpose. *Field v. Barling*, 311.
36. **STREETS—DEDICATION, EFFECT OF.**—When the owner of land lays out and establishes a town, and makes and exhibits a plan thereof, with various plats of spare ground for streets and alleys, and sells lots with clear reference to such plan, the purchasers of lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as part of the town, or to their owners, as citizens of the town. The right thus passing to the purchasers is not the mere right that they may use the streets or other public places according to their appropriate purposes, but a right vesting in them that all persons whatever, as occasion may require or invite, may so use them, and that they shall be forever open to the use of the public, free from all claim or interference of the landowner inconsistent with such use. *Field v. Barling*, 311.
37. **GRADING STREETS, DAMAGES FOR.**—The owner of a lot fronting on a public street is entitled to consequential damages arising from a change of the natural surface of the street to a legally established grade, if the constitution of the state declares that “private property shall not be taken or damaged without just compensation,” if the lot is situated in a small town or city in which the necessity for such grading may never arise. In cities of this class the dedicatory and his assigns should only be held to give implied assent to such improvements as would put the street in a condition for safe and reasonably convenient use upon or near the natural surface, considering the peculiarities of the locality. *Davis v. Missouri Pac. Ry. Co.*, 648.
38. **DAMAGES FOR GRADING A STREET TO A PREVIOUSLY ESTABLISHED GRADE** cannot include damages to improvements erected after such was established as a matter of record, ascertainable by property owners. *Davis v. Missouri Pac. Ry. Co.*, 648.

39. **GRADING STREETS, DAMAGES FOR.**—If property is damaged by establishing the grade of a street, or by raising or lowering a grade previously established, compensation is recoverable therefor under a constitution declaring that private property shall not be taken or damaged for public use without just compensation. *Hickman v. City of Kansas*, 684.
40. **CONTROL OVER STREETS.—POWER TO DEVOTE TO PRIVATE USE.**—A city has ample power to control, regulate, and improve its streets and alleys in such manner as the demands of the public require; but it has no power to devote its alleys or streets, or any part thereof, to a private use. *Field v. Barling*, 311.
41. **PUBLIC STREETS.—TO WHAT USES MAY BE APPROPRIATED.—RAILWAYS THEREIN.**—Having the free and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the primary object for which they were established, namely, ordinary passage and travel. In the application of this rule a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer, and gas pipes under, public streets, and property owners can neither enjoin such use, nor recover damages to property occasioned thereby. *Barrows v. City of Sycamore*, 400.
42. **THE PUBLIC ALONE CAN COMPLAIN OF OBSTRUCTIONS TO STREETS** resulting in no special injury to an individual. *Barrows v. City of Sycamore*, 400.
43. **ACTION FOR OBSTRUCTING STREET.—PLEADING.**—In an action against a city for an injury to the plaintiff's property caused by the erection of a stand-pipe in the street, certain counts of the declaration alleging that the plaintiff's property had been depreciated in value because of the danger of the building being destroyed or damaged by the stand-pipe falling or being blown upon it, or by bursting and flooding it with water, but alleging no fact upon which the apprehension of such danger could be based, fail to state a good cause of action. But a count in such declaration averring that "said stand-pipe obstructs the light to said plaintiff's hotel building, and particularly to the parlor and sitting-room in the southwest corner," etc., is a sufficient allegation of special injury to entitle the plaintiff to a recovery. *Barrows v. City of Sycamore*, 400.
44. **PUBLIC STREETS.—OBSTRUCTIONS IN.—RIGHT OF ACTION.**—No action will lie for an obstruction in a public street if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value. To warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. When the action is by an individual the special injury is the gist of the action, and unless it is alleged and proved there can be no recovery. *Barrows v. City of Sycamore*, 400.
45. **PUBLIC STREETS.—OBSTRUCTIONS IN.—STAND-PIPE.**—Water and gas pipes, with hydrants, lamp-posts and other appliances, are necessary for the distribution of water and light throughout the municipality, and the streets may be legitimately used for that purpose, but water or gas works themselves cannot be lawfully built in a public street, as not being inconsistent with the public use. And placing a stand-pipe in a public street, near the building thereon, is an unlawful use of such street,

- and the dimensions of the structure, and the manner of operating it affect only the question of damages. *Barrows v. City of Scyamore*, 400.
46. **PUBLIC HIGHWAY—LIABILITY OF TOWN.**—A town cannot be held liable for injuries resulting from the fright of a horse caused by the presence of building materials in the highway, although of such a nature as to frighten horses of ordinary gentleness, unless an unlawful or unreasonable use was being made of the highway in placing them there, of which fact the town authorities had notice. *Loberg v. Town of Amherst*, 69.
47. **MUNICIPAL BONDS—FRAUDULENT ISSUE—PAYMENT OF INTEREST—ESTOPPEL.**—When a municipal corporation has no power to issue bonds its acts in levying taxes for their payment and the payment of interest thereon is illegal, and can neither give validity to the bonds nor estop the corporation from asserting their invalidity. *First Nat. Bank v. District Tp.*, 489.
48. **MUNICIPAL BONDS—ISSUE IN EXCESS OF CONSTITUTIONAL LIMIT OF INDEBTEDNESS—NOTICE TO PURCHASER.**—Municipal bonds issued on a contract which creates a debt in excess of constitutional limitations are invalid, and a bona fide purchaser is charged with notice that the indebtedness thus created by the corporation is in excess of the amount limited by the constitution. *First Nat. Bank v. District Tp.*, 489.
49. **A MUNICIPAL CORPORATION IS LIABLE FOR ITS NEGLIGENT FAILURE TO COLLECT MONEYS DUE FROM PROPERTY OWNERS** for the improvement of a public street, and an action may be sustained by the contractor who did such work and is entitled to such moneys when collected, though in his contract he stipulated he would look to a special fund for payment, and would not compel the city, by legal process or otherwise, to pay for the improvement out of any other fund. There is nothing in this stipulation absolving the city from the duty of making the assessment and enforcing its collection, and its failure to perform such duty renders it answerable for the consequent damages. *Commercial Nat. Bank v. Portland*, 854.
50. **CONSTITUTIONAL LAW—ALDERMANIC REPRESENTATION.**—It is not imperative that there shall be aldermanic representation in towns and cities under the constitution of Colorado. *Mayor v. Shattuck*, 208.
51. **PUBLIC OFFICERS—REMOVAL OF—MEANS OF EXERCISING POWER OF.** When a municipal ordinance provides for the removal of officers for specific causes, but does not point out the means whereby the removal is to be effected, the means necessary to the exercise of the power pass as incidents of the grant. *State v. Walbridge*, 663.
52. **THE REMOVAL OF AN OFFICER** of a municipal corporation for just and reasonable cause is one of its common-law powers. *State v. Walbridge*, 663.
53. **PUBLIC OFFICERS.—A MUNICIPAL ORDINANCE AUTHORIZING THE MAYOR TO REMOVE AN OFFICER FOR CAUSE** is valid, and entitles the mayor to exercise all powers incident to the authority conferred, such as giving notice to the accused of the charges against him, and hearing witnesses offered in his behalf or in support of such charges. *State v. Walbridge*, 663.

See BOUNDARIES; INJUNCTIONS, 2-4; STATUTES, 12.

## MURDER.

See HOMICIDE.

## NAMES.

See JUDGMENTS, 3, 4, 6.

## NAVIGATION.

See WATERS, 1.

## NECESSARIES.

See HUSBAND AND WIFE, 1; MARRIAGE AND DIVORCE.

## NEGLECTANCE.

1. **WHO MAY RECOVER FOR.**—To maintain an action for negligence the plaintiff must show the existence of a duty to him on the part of the defendant. *Bottoms v. Seaboard etc. R. R. Co.*, 799.
2. **WHO SHOULD SUFFER FOR.**—Where one of two innocent parties must suffer from negligence the loss should be borne by him through whose negligence the mishap was brought about. *Wittenbrock v. Parker*, 172.
3. **PROXIMATE CAUSE.**—The failure of the owner of a gin to perform his contract to gin the cotton of another within a specified time is not the proximate cause of its subsequent loss by fire while at his gin. Such breach of contract is only one of antecedent events, without which the loss would not have occurred. *James v. James*, 95.
4. **A CHILD** is held to such care and prudence only as are usual among children of his age and capacity. *Haynes v. Raleigh Gas Co.*, 786.
5. **CONTRIBUTORY OF INFANT.**—An infant only twenty-two months old is incapable of contributory negligence. *Bottoms v. Seaboard etc. R. R. Co.*, 799.
6. **CONTRIBUTORY OF PARENT.**—The contributory negligence of a parent cannot relieve from liability to an infant, itself of too tender years to be chargeable with negligence, a person through whose negligence such infant has been injured. *Bottoms v. Seaboard etc. R. R. Co.*, 799.
7. **CONTRIBUTORY, IN TAKING HOLD OF A LIVE ELECTRIC WIRE.** A child ten years of age is not chargeable with contributory negligence because he took hold of a wire in the street charged with a deadly current of electricity, if there was nothing from which even an adult could have inferred that the wire was carrying any current of electricity whatever. *Haynes v. Raleigh Gas Co.*, 786.
8. **ELECTRIC WIRES IN STREETS.**—A corporation permitted to construct and maintain a line of electric wires in the public streets, for the purpose of private gain, owes the duty to persons upon such streets of so conducting its business as not to injure them. It must, therefore, keep its wires out of the way of persons using the streets so that they will not, by coming in contact with such wires, receive personal injuries. *Haynes v. Raleigh Gas Co.*, 786.
9. **ELECTRIC CORPORATIONS PERMITTED TO USE THE PUBLIC STREETS** for their own purposes must be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. *Haynes v. Raleigh Gas Co.*, 786.
10. **ELECTRIC WIRES.**—PROOF THAT THERE WAS A LIVE WIRE CARRYING A DEADLY CURRENT OF ELECTRICITY down in the public streets raises the presumption that some one failed in his duty to the public. *Haynes v. Raleigh Gas Co.*, 786.

11. **PRESUMPTION OF INJURY FROM ELECTRIC WIRES.**—If a corporation is permitted to maintain electric wires in the public streets and one of such wires is detached from a tree to which it has been fastened, and is hanging to the ground charged with a deadly current of electricity, which it received in coming in contact with the feed wire of another corporation, and a boy taking hold of the wire is killed, the corporation to which the detached wire belongs is presumed to have been negligent, and must assume, in an action for damages resulting from such killing, the burden of proving that there was no negligence on its part. *Haynes v. Raleigh Gas Co.*, 786.
  12. **EVIDENCE** that there was published in the newspapers of the city a statement by an electric railway company that its current was not a deadly one is not admissible in favor of an electric corporation sued for damages sustained from one of its wires becoming detached, falling to the ground, and transmitting from the feed wire of the railroad company a deadly current with which a boy came in contact to the loss of his life. The defendant corporation had no right to act upon this statement without examination and further inquiry. *Haynes v. Raleigh Gas Co.*, 786.
  13. **CONTRIBUTORY NEGLIGENCE—NONSUIT.**—Proof of contributory negligence must be clear and decisive to warrant a nonsuit, or an absolute direction to the jury on that ground. And it was held in this case that the evidence did not show clearly and decisively that the plaintiff's intestate was guilty of contributory negligence, so as to justify a nonsuit on that ground, and that it was properly a question for the jury, in view of all the facts and circumstances disclosed. *Thoresen v. La Crosse etc. Ry. Co.*, 64.
- See CARRIERS, 8; DAMAGES, 4; MASTER AND SERVANT, 4; MUNICIPAL CORPORATIONS, 49; PLEADING, 4; RELEASE; TELEGRAPH COMPANIES.

### NEGOTIABLE INSTRUMENTS.

1. **INDORSEMENT OF—PAROL EVIDENCE TO VARY.**—Parol proof of a contemporaneous parol agreement is admissible to plain or qualify a blank indorsement of a promissory note in an action between the parties thereto. *Holmes v. First Nat. Bank*, 733.
2. **INDORSEMENT IN BLANK—PAROL EVIDENCE TO VARY.**—A blank indorsement of a negotiable instrument before due, transferred to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. *Holmes v. First Nat. Bank*, 733.
3. **BLANK INDORSEMENTS—PAROL EVIDENCE TO VARY.**—As between the parties to a negotiable instrument, a blank indorsement may be modified by parol evidence, and the entire transaction may be thus shown, although resting partly in writing and partly in parol. This does not affect a third party who is a holder without notice before due, and for a valuable consideration. *Holmes v. First Nat. Bank*, 733.

### NEWSPAPERS.

See LIBEL, 5-9; NEGLIGENCE, 12.

### NEW TRIAL.

See APPEAL, 3, 6, 12.

## INDEX

## NONSUIT.

See NEGLIGENCE, 13.

## NOTICE.

1. **NOTICE, WHEN MUST BE GIVEN.**—If a mortgage was given upon real property and duly placed upon record at the time when the title appeared by the record to be free from all other liens, and a suit is afterwards brought to foreclose the mortgage, which was satisfied of record, on the ground that such satisfaction was entered by mistake, the plaintiff must assume the burden of proving that the mortgage of the second mortgage was not with notice that the prior mortgage had not in fact been satisfied. *Ward v. Pease*, 152.
  2. **CONVEYANCE—LACHETTY ACT.**—THE RECORD OF A CONVEYANCE OF REAL PROPERTY MADE BY ONE HAVING NO TITLE THERE TO does not, after his acquisition of the title, operate as constructive notice to subsequent purchasers from him. An intending purchaser who searches the records from the time of the acquisition of such title does his whole duty, and cannot be deprived of the benefit of his purchase, though the prior deed made by the grantor before acquiring title was in such form that on the acquisition of the title it vested in the first grantee as against all persons having notice of the conveyance. *Ford v. Unity Church Society*, 71.
- See ACKNOWLEDGMENT, AGENT, 4, 5; APPEAL, 4, 5; ATTORNEY AND COUNSEL, 2 & 3; CARRIERS, 3; EJECTMENT, 4; MASTER AND SERVANT, 3; DEEDS, 13, 15; SCHOOLS, 2.

## NUISANCE.

1. **LIVERY-STABLES** in municipalities are not per se nuisances. They may become such if not constructed and used in a proper manner. *Phillips v. Turner*, 234.
  2. **DISCHARGE OF SEWAGE.**—The fact that the stream into which it is proposed to empty city sewage by system of sewers, near the complainant's farm, is not a running stream during all portions of the year, but in very dry weather contains only small pools standing in the deeper parts of its channel, serves only to aggravate the nuisance, especially when the complainant's land is situated but a little distance from the proposed point for the discharge of the sewage. *Farage v. Turner*, 36.
- See COMPANIES, 2; EJECTMENT, 1, 6; MUNICIPAL CORPORATIONS, 13; RAILROADS, 13.

## OBSTRUCTIONS.

See EASEMENTS; HIGHWAYS, 1; EJECTMENT, 1, 2; MUNICIPAL CORPORATIONS, 42, 45.

## OCCUPATIONS.

See MUNICIPAL CORPORATIONS, 13.

## OFFICERS.

1. **OFFICIAL BOND—OFFICE OR.**—The official bond given by a public officer does not extend his legal liability. Its office is to secure the faithful and prompt performance of his duties. *Wason v. People*, 243.



2. **LIABILITY FOR SAFEKEEPING OF MONEY.**—A public officer receiving money by virtue of his office is a bailee. The extent of his liability is that imposed by law. When unaffected by constitutional or legislative provisions his duty and liability are measured by the law of bailment. *Wilson v. People*, 243.
3. **LIABILITY FOR SAFEKEEPING OF MONEY.**—A clerk of a court who receives money by virtue of his office, and deposits it in a bank of reputed solvency, and in doing so acts as prudent men ordinarily do with their own funds, is not liable for the subsequent loss of the money through the failure of such bank. Nor are his sureties on his official bond liable in such case. *Wilson v. People*, 243.
4. **PUBLIC OFFICE IS NOT PROPERTY** within the meaning of constitutional provisions providing that no person shall be deprived of life, liberty, or property without due process of law. *Attorney General v. Jochim*, 606.
5. **APPOINTMENT OR ELECTION TO PUBLIC OFFICE** does not establish contract relations between the person appointed or elected and the public. *Attorney General v. Jochim*, 660.
6. **PUBLIC OFFICES ARE DELEGATIONS OF PORTIONS OF SOVEREIGN POWER** for the welfare of the people. They are not the subject of contracts, but are agencies for the state, revocable at pleasure by the authority creating them, unless such authority is limited by the power which conferred it. *Attorney General v. Jochim*, 606.
7. **REMOVAL FROM PUBLIC OFFICE** is not a deprivation of the officer of property, even if the removal must be for cause, upon specific charges, and after an opportunity to be heard. *Attorney General v. Jochim*, 606.
8. **LEGISLATIVE POWER TO CREATE, FILL, AND REMOVE FROM OFFICE.**—The legislature, having the power to provide for the creation of a public office, has power to declare the manner in which such office shall be filled, and also provide for removals therefrom. *Trimble v. People*, 236.
9. **CREATION OF OFFICE AND REMOVAL THEREFROM.**—When an office is created by statute and the manner of filling it and the mode of removal are also provided by statute, the question of removal therefrom and the causes therefor are not affected by a constitutional provision relating to removals from office. *Trimble v. People*, 236.
10. **REMOVAL OF.**—The legislature may remove public officers, not only by abolishing the office, but by act declaring it vacant, and may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations. *Attorney General v. Jochim*, 606.
11. **REMOVAL.**—A constitutional state officer takes office subject to an existing constitutional provision that he may be removed by the governor for specified reasons, and the governor may so remove him without a trial by jury, and the intervention of the constitutional judiciary. *Attorney General v. Jochim*, 606.
12. **OFFICE TAKEN SUBJECT TO WHAT CONDITIONS.**—Statutory offices are taken subject to legislative action as to removal, and constitutional offices are taken subject to constitutional provisions and changes; both classes of offices are taken upon the terms, and subject to the conditions existing by law. *Attorney General v. Jochim*, 606.
13. **POWER OF GOVERNOR TO REMOVE OFFICER.**—When a statute creating an office also provides that the governor may remove the incumbent therefrom for cause, provided the removal is not made for political reasons, and the cause of removal is stated in writing, the governor may

- remove such officer for any cause other than political. Of the sufficiency of the cause he is the sole judge. *Trimble v. People*, 236.
14. **POWER OF GOVERNOR TO REMOVE OFFICER.**—When a statute creating a public municipal office invests the governor with power to remove the incumbent therefrom for cause, without restriction except that the removal must not be made for political reasons, and that the cause therefor must be stated in writing, the governor is not required, as a prerequisite to removal, for any other cause, to institute an investigation in the nature of a judicial or quasi judicial inquiry. The cause sufficient to warrant removal is to be determined solely by the governor. No mode of inquiry being prescribed, he is at liberty to adopt such mode as to him shall seem proper, without interference from the courts. Hence, his refusal to hear counsel is not fatal to his action, because he may proceed *ex parte* if he so desires. *Trimble v. People*, 236.
  15. **CONSTITUTIONAL LAW—REMOVAL FROM OFFICE BY GOVERNOR.**—When the state constitution invests the governor with power to remove certain constitutional state officers for gross neglect of official duty, it is the duty of the governor, upon discovering such neglect, to remove them after notice to them of the charge, and an opportunity to be heard, and although his action is in a sense judicial, it is no valid objection thereto that he acts both as accuser and judge. *Attorney General v. Jochim*, 606.
  16. **CONSTITUTIONAL LAW—REMOVAL FROM OFFICE BY GOVERNOR—GROSS NEGLECT OF OFFICIAL DUTY.**—When the constitution makes it the duty of the secretary of state, as a member of a board of state canvassers, to canvass returns and certify the result of elections, it is gross neglect of official duty on his part to fail to perform such official duty, and to permit an erroneous canvass by clerks or deputies, and, although such erroneous canvass is not permitted intentionally or willfully, it is the duty of the governor, upon discovering such neglect, to remove such officer from office when he is invested with such power under the state constitution. *Attorney General v. Jochim*, 606.
  17. **CONSTITUTIONAL LAW—REMOVAL FROM OFFICE.**—Citation by the governor to state officers to appear before him and show cause why they should not be removed from office is not such an official act as needs authentication, within the meaning of a constitutional provision requiring that "all official acts of the governor, his approval of the laws excepted, shall be authenticated by the great seal of the state," especially when he is citing the custodian of the great seal before him upon charges of official misconduct. *Attorney General v. Jochim*, 606.
  18. **REMOVAL FROM OFFICE FOR CAUSE CANNOT TAKE PLACE WITHOUT NOTICE** to the accused officer. Though the law conferring authority to make such removal does not expressly provide for such notice, still it must be presumed to have been intended as a prerequisite to the exercise of the power. *State v. Walbridge*, 663.
  19. **CONSTITUTIONAL LAW—REMOVAL FROM OFFICE, FOR WHAT CAUSES MAY BE AUTHORIZED.**—If the constitution of the state declares that the legislature shall, in addition to other penalties, provide for removal from office of county, city, town, and township officers on conviction of illegal, corrupt, or fraudulent violation or neglect of official duty, the legislature is not thereby limited to the power of passing laws for the removal of officers on the ground specified in this provision of the constitution. *State v. Walbridge*, 663.

**20. REMOVAL—QUESTION FOR THE COURTS.**—THOUGH THE removal of an officer for cause is authorized by law, the courts must determine the sufficiency of the alleged cause. *State v. Walbridge*, 663.

**See** CONSTITUTIONS, 5; INDICTMENT, 1; MUNICIPAL CORPORATIONS, 51-53; STATUTES, 20; TAXES, 8.

### ORDINANCES.

**See** EVIDENCE, 11; INJUNCTION, 3; MUNICIPAL CORPORATIONS, 8-33; RAILROADS, 25.

### OYER.

**See** TRIAL, 4, 6.

### PARENT AND CHILD.

**See** ADOPTION; NEGLIGENCE, 6; SALES, 2; WILLS, 7.

### PAROL.

**See** EVIDENCE; TRUSTS, 1, 2.

### PARTIES.

**See** APPEAL, 4, 5; CONTRACTS, 11, 12; CORPORATIONS, 7; GUARDIAN AND WARD, 1, 3; INFANTS; TRUSTS, 5; WITNESSES, 4.

### PARTITION.

- 1. A PAROL PARTITION, THOUGH SOME OF THE PARTIES ARE MARRIED WOMEN** and their husbands did not join therein, if fair and equal and followed by possession in severalty taken and held in accordance therewith, passes the equitable title, and the courts will confirm such partition and vest the legal title in the respective parties. *Sutton v. Porter* 645.
- 2. A PAROL PARTITION, in which one of the tenants in common did not join at the time, may be ratified by him afterwards by taking possession of and conveying the part assigned to him.** *Sutton v. Porter*, 645.
- 4. PROBATE PARTITION, JURISDICTION TO MAKE, WHEN LOST.**—Under a statute declaring that partition of the estate of a decedent may be ordered on the petition of any person interested therein, and such petition may be filed and notice given at any time before the entry of the decree of distribution, a petition filed after the entry of such decree cannot give the court jurisdiction to proceed to make partition. *Buckley v. Superior Court*, 135.
- 6. PROBATE PARTITION CANNOT BE MADE EXCEPT OF ESTATES OF WHICH THE DECEDENT DIED SEISED IN SEVERALTY, and this remains true, though one of the heirs is the owner of the other moiety of the property. The subject matter of the jurisdiction is the property of the decedent only, and this jurisdiction cannot be extended even by the consent of the parties interested.** *Buckley v. Superior Court*, 135.

**See** PRIVATE WAYS, 1.

### PAYMENT.

**See** DEBTOR AND CREDITOR.

## PENALTY.

See DEFINITIONS.

## PERJURY.

**VARIANCE.**—When an indictment for perjury is based upon a written instrument set out therein *in hac verba*, and the instrument offered in evidence bears a different date from the one set out, the variance is material as to matter of description, and a conviction on such evidence cannot be sustained. *Dill v. People*, 254.

## PERSONAL PROPERTY.

See DISTRIBUTION; SALES.

## PLEADING.

1. **DEMURRER—HARMLESS ERROR.**—It is only when the allegations of a proper paragraph of pleading may be established by proof under other paragraphs that the sustaining of a demurrer to the paragraph in question is held harmless. *Barnard v. Sherley*, 454.
2. **AN ANSWER IS NOT FRIVOLOUS** unless it appears to be so by the bare statement of it, and without argument. *The Victorian*, 838.
3. **A MOTION TO STRIKE OUT** part of a pleading as irrelevant, should be denied if it states a semblance of a cause of action or of defense. The proper mode of testing the sufficiency of a cause of action or of defense is by demurrer, and not by motion to strike out. *The Victorian*, 838.
4. **EVIDENCE.**—The Wisconsin statute, Sanborn and Berryman's Annotated Statutes, section 1816 *a*, gives a right of action against a railroad company for injuries sustained by one employee through the negligence of a co-employee. And the rules of pleading require that the allegations of a complaint in an action under this statute shall show clearly the relation between the negligent party and the company relied on, and the proofs must be confined to the allegations made. *Albrecht v. Milwaukee etc. Ry. Co.*, 30.

See **INDICTMENT**, 2; **INJUNCTIONS**, 5; **LIMITATIONS OF ACTIONS**, 1-4; **MASTER AND SERVANT**, 2, 4.

## PLEDGE.

1. **ASSIGNMENT OF BY ADMINISTRATOR.**—An administrator may sell at private sale, without notice, his interest in securities held by the decedent as pledgee, at the time of his death, without demanding payment of the pledgor. The rights of the latter are not affected by such assignment. *Drake v. Cloonan*, 586.
2. **ASSIGNMENT OF.**—A pledgee of personalty or securities cannot, to the injury of his pledgor, transfer the pledge or divest the pledgor of title thereto until he has demanded payment, and given the pledgor opportunity to redeem, and then only at public sale and on notice. *Drake v. Cloonan*, 586.

## POLICE POWER.

See **INTERSTATE COMMERCE**, 2, 3; **RAILROADS**, 4; **SUNDAY**.

## POLLUTION.

See **EASEMENTS**, 4; **INJUNCTIONS**, 7; **NUISANCE**, 2; **WATERS**, 2, 3.

**POSSESSION.**

See **SALES**, 1-3.

**PRESUMPTIONS.**

See **NEGLIGENCE**, 10, 11; **OFFICERS**, 18; **REWARDS**.

**PRINCIPAL AND AGENT.**

See **AGENCY**.

**PRINCIPAL AND SURETY.**

See **SURETYSHIP**.

**PRIORITY.**

See **MECHANICS' LIENS**, 1, 2.

**PRIVATE WAYS.**

1. **WAYS OF NECESSITY—PARTITION.**—On the partition by judgment of a tract of land, if one of the parcels set aside to be held in severalty is so situated that a way of necessity would be implied in its favor had it been conveyed by all the tenants in common to one of their number, the same implication arises in favor of the person to whom it was set aside by such judgment and his successor in interest, whether the way was referred to in the judgment or not. *Blum v. Weston*, 188.
2. **WAY OF NECESSITY.**—THE RIGHT OF A WAY OF NECESSITY PASSES with each successive transfer of the title, whether voluntary or involuntary. *Blum v. Weston*, 188.
3. **A RIGHT OF WAY OF NECESSITY** cannot be denied on the ground that such a way could be procured by condemnation under the statute. *Blum v. Weston*, 188.
4. **WAY OF NECESSITY.**—It is no answer to the existence of a way of necessity that the persons over whose land it is claimed should have designated its locality, as, if they did not, the owners of the dominant estate could designate it. *Blum v. Weston*, 188.
5. **WAY OF NECESSITY, LACHES IN CLAIMING.**—A way having been created by necessity for its use cannot be extinguished so long as the necessity continues to exist, and therefore continues though not claimed for many years during which another right of way was used under a special agreement. *Blum v. Weston*, 188.

See **EMINENT DOMAIN**, 4.

**PRIVILEGE.**

See **WITNESSES**, 4.

**PRIVILEGED COMMUNICATIONS.**

See **LIBEL**, 1, 2, 5, 8, 9.

**PROBATE COURT.**

See **APPEAL**, 1, 2; **EXECUTORS AND ADMINISTRATORS**, 3, 4; **JURISDICTION**, 6, 7.

**PROCESS.**

**EXEMPTION FROM SERVICE OF.**—There can be no valid service of a summons upon a justice of the peace while holding court, nor upon a party or

the employment, is legislative and not judicial. Independently of constitutional provisions, the legislature has power to regulate freight and passenger charges of railroad companies, and the charges for services of other employments public in character, subject only to such restraints as are imposed by charter, contracts, and by the authority of Congress to regulate foreign and interstate commerce. *Chicago etc. R. R. Co. v. Jones*, 273.

12. **REGULATION OF FREIGHTS AND FARES BY COMMISSIONERS.**—A statute not attempting to fix freights and fares to be charged by railroad companies, but merely authorizing a board of commissioners to make a schedule of rates which shall be *prima facie* evidence of the reasonableness thereof, is not a delegation to the board of the legislative power to establish such rates, and is not invalid. It leaves the reasonableness of the rates fixed by the commissioners open to inquiry by the courts. *Chicago etc. R. R. Co. v. Jones*, 273.

13. **CONSTITUTIONAL LAW—REGULATION OF FREIGHTS AND FARES BY COMMISSIONERS.**—A statute making a schedule of rates of freight and fares to be charged by railroad companies, as fixed by a board of commissioners, *prima facie* evidence that they are reasonable, is not unconstitutional and void as depriving the carrier of property without due process of law, nor as infringing upon the right of trial by jury. The courts have the right to determine the reasonableness of the rates thus fixed, and the statute merely prescribes a rule of evidence. *Chicago etc. R. R. Co. v. Jones*, 273.

14. **TICKETS AS CONTRACTS.**—A railroad ticket is not a contract, but merely evidence of a contract or a mere receipt taken, or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another. *Burdick v. People*, 329.

15. **DAMAGES.**—In assessing damages to a landowner for a right of way taken by a railroad company regard is had only to the immediate consequences of the appropriation. The owner is not, in such proceedings, compensated for damages which may thereafter result from negligent acts of the company committed after it makes the appropriation. *Hunt v. Iowa Cent. Ry. Co.*, 473.

16. **EMINENT DOMAIN—SEQUENT DAMAGES—OVERFLOW OF LANDS.**—Damages suffered by a landowner from an overflow of surface water discharged upon his land through the negligence of a railway company in constructing its roadbed are not included in the price paid by the company for its right of way. *Hunt v. Iowa Cent. Ry. Co.*, 473.

17. **DAMAGES FROM OVERFLOW OF LANDS—EVIDENCE.**—When, in an action against a railroad company to recover damages for negligently overflowing lands by a discharge of surface water thereon in April and May, 1889, deeds in evidence show that the company acquired title to the road in December, 1888, the exclusion of evidence offered by the company to show that a receiver, through whom it acquired title, and who had formerly been operating the road, made his final settlement with the court in May, 1889, and that it did not come into possession of the road until after the latter date, if error, is without prejudice. *Hunt v. Iowa Cent. Ry. Co.*, 473.

18. **NUISANCE—RAILROADS LIABILITY OF FOR.**—A railroad company, as the grantee and successor of another railway company which has maintained a nuisance, is liable for damages arising from its continuance, of which it had sufficient notice. *Hunt v. Iowa Cent. Ry. Co.*, 473.

19. **CARRIERS OF PASSENGERS.**—If an IMPATIENT TRAVELER RUSHES HEEDLESSLY and pushes the door of a railway car violently open, causing it to strike and injure a fellow-passenger, the carrier is not answerable for the damages thus sustained. *Graeff v. Philadelphia etc. R. R.*, 885.
20. **MASTER AND SERVANT—LIABILITY FOR SERVANT'S TORTS.**—A railway company is liable in damages for any wrongful or negligent act of its night watchman performed in the course of his employment, resulting in injury to another, though he exceeds his authority. *St. Louis etc. Ry. Co. v. Hackett*, 105.
21. **MASTER AND SERVANT—LIABILITY FOR SERVANT'S TORTS.**—A railway company is not liable for the wrongful act of an officer of the law while acting as its night watchman, if the act is committed in the discharge of, or in an endeavor to discharge, his duty as such officer, though he acts in excess of his authority as such. *St. Louis etc. Ry. Co. v. Hackett*, 105.
22. **MASTER AND SERVANT—VICE-PRINCIPALS.**—A foreman of a gang of railway workmen, engaged in repairing trestles and bridges, and having power to employ and discharge such men, and to oversee and direct their work, is a vice-principal of the railway company, and it is liable for his negligence whereby one of the workmen receives an injury. *Bloyd v. St. Louis etc. Ry. Co.*, 85.
23. **CHILD ON TRACK, DUTY TO.**—If a child is on the track of a railway of such an age that it cannot comprehend the danger, and the defendants' servants in charge of the train, by the exercise of reasonable care and prudence, could have discovered the child in time to stop the train it was their duty to do so; or, if they, in the exercise of ordinary care and prudence, could have discovered that the child was going towards the track or running along very near it so as to render it probable that it would go on the track, and such discovery could have been made in time to stop the train, it was their duty to stop. If, on the other hand, the child came on the track suddenly and unexpectedly, so near that it could not be discovered in time to stop the train in the exercise of ordinary care, or if the engineer and fireman were, by necessary attendance on their duties, prevented from seeing the child until too late to stop the engine in the exercise of ordinary care in time to avoid harm to the child, then there is no negligent act nor liability for resulting injury. *Bottoms v. Seaboard etc. R. R. Co.*, 799.
24. **STREET RAILWAYS—DUTY OF CARDRIVER.**—It is the duty of the driver of a street-car to exercise the highest degree of care to avoid any collision or accident, especially at street crossings. He should exercise all the care that prudence may suggest in looking about and listening to assure himself that his track is clear and safe, and for failure to do so his employer is responsible. *Thoresen v. La Crosse etc. Ry. Co.*, 64.
25. **STREET RAILWAYS—CITY ORDINANCE.**—A city ordinance which gives priority of passage to a street-car when met or overtaken by any other vehicle, does not give the driver of the car any right to ignore or disregard the presence of other vehicles on the street, and particularly at crossings. *Thoresen v. La Crosse etc. Ry. Co.*, 64.
26. **STREET RAILWAYS—CROSSINGS.**—Failure on the part of a street-car driver to keep a lookout ahead, when approaching a crossing, is not excused by the fact that he was giving his attention solely to an



attempted identification of another car to which he expected to change.  
*Thorsen v. La Crosse etc. Ry. Co.*, 64.

See INJUNCTIONS, 5; MANDAMUS, 2; MECHANICS' LIENS, 2; MUNICIPAL CORPORATIONS, 41; PLEADING, 4; STATUTES, 8, 12, 18, 23.

### RATIFICATION.

See AGENCY, 7; PARTITION, 2.

### REAL PROPERTY.

1. **AEROLITES—OWNERSHIP.**—An aerolite becomes part of the soil on which it falls and in which it is imbedded, and is the property of the owner of such soil, and not of another who finds it, digs it up, and removes it. *Goddard v. Winchell*, 481.
2. **STREET OBSTRUCTIONS—DAMNUM ABSQUE INJURIA.**—Certain injuries necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, as, for instance, the building of a jail, police station, or the like, causing a direct depreciation in the value of neighboring property, are classed among cases of *damnum absque injuria*, for which the law affords no relief. *Barrows v. City of Sycamore*, 400.
3. **DAMAGES FROM LAWFUL ENTERPRISE—DAMNUM ABSQUE INJURIA.**—When a work is lawful in itself, and cannot be carried on elsewhere than where nature located it or public necessity requires it to be, those liable to receive injury from its operation only have a right to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected, and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation, as it is *damnum absque injuria*. *Barnard v. Sherley*, 454.

### REASONABLE DOUBT.

See APPEAL, 15; TRIAL, 1, 2.

### RECEIPTS.

See BILLS OF LADING; CARRIERS, 2.

### RECEIVERS.

1. **COMPENSATION OF.**—In the absence of legislation regulating the compensation of a receiver the court appointing him has the right to determine the amount that shall be paid, and, in passing upon such compensation, the appellate court ordinarily defers to the judgment of the appointing court. *Heffron v. Rice*, 271.
2. **MEASURE OF COMPENSATION.**—The compensation received by a receiver should correspond with the degree of business capacity, integrity, and responsibility required in the management of the affairs intrusted to him. A reasonable and fair compensation should be allowed, according to the circumstances of each case. *Heffron v. Rice*, 271.
3. **PROOF OF ACCOUNT.**—When a receiver's account consists of numerous items of payments made in the regular course of business, for some of which he has no receipts, but all of which are fully and correctly entered in books kept by him, his account should be approved by the court. *Heffron v. Rice*, 271.

4. **DUTY TO FILE INVENTORY—LIABILITY FOR DELAY.**—It is the duty of a receiver to make out and file with the court a list of the property which passes into his hands, so that creditors and all persons interested may know what property belongs to the parties in the case. A delay in filing such inventory is no ground of complaint, unless injury is shown to have been caused thereby. *Heffron v. Rice*, 271.
5. **RIGHT TO BORROW MONEY.**—Although a receiver may have no right to borrow money, yet if he uses money borrowed by him to discharge a valid lien on the property committed to his charge, and acts in good faith in making the payment, he is entitled to credit therefor as against the insolvent debtors who have received the benefit of the payment. *Heffron v. Rice*, 271.
6. **PAYMENT OF INTEREST BY—CREDIT FOR.**—A receiver who pays interest on debts secured by deed of trust on the assigned property is entitled to credit therefor, although such interest is paid out of money borrowed by him from one of his insolvent assignees and afterwards repaid to the latter by him. *Heffron v. Rice*, 271.
7. **RECEIVERS HAVE NO RIGHT TO LOAN FUNDS** coming to their hands as receivers. If they loan such money and lose it they must stand the loss, except under special circumstances. *Heffron v. Rice*, 271.
8. **LIABILITY FOR LOANS MADE BY.**—A receiver acting as the manager of a hotel business must necessarily exercise his discretion in many cases. If he acts in good faith, and conducts the business as a prudent person would his own, he is not liable for the loss of a small loan made to a guest. *Heffron v. Rice*, 271.

**RECORD.**See **APPEAL**, 8; **NOTICE**.**REDEMPTION.**See **PLEDGE**, 2.**REGISTRATION.**See **DEEDS**, 2, 3.**REHEARING.**See **APPEAL**, 20.**RELEASE.**

**BURDEN OF PROOF.**—One who signs a written release in ignorance of its contents is presumptively guilty of gross negligence, and the burden of proof rests upon him to rebut the presumption. *Albrecht v. Milwaukee etc. Ry. Co.*, 30.

See **DEBTOR AND CREDITOR**.**REMEDIES.**See **STATUTES**, 17.**REMOVAL.**See **MUNICIPAL CORPORATIONS**, 51-53; **OFFICERS**, 6-20.**RENT.**See **COTENANCY**, 1; **DOWER**, 3.

## JURY

### JURY

See JUDGMENT, 21.

### SEPTENNARY

See JUDGMENT, 21.

### SEQUEL

See SEQUEL, 11.

## SEVERALTY OF TRADE

See ANTI-TRUST; CONTRACTS, 15-18.

### SETTLEMENT

See ANTI-TRUST, 9, 11-13, 18.

### SETTLEMENT

See ANTI-TRUST, 6; BUSINESS, 2-5; EASEMENTS, 4; REWARDS.

### REWARDS

1. **ANTI-TRUST—REWARDS—PRESCRIPTION.**—An offer of reward for the detection of an offender or the recovery of property is a proposal in writing. It takes effect upon its revocation the offer and acceptance by a performance become a valid contract for a sufficient consideration. It may be revoked at any time before acceptance, and though unlimited as to time and never withdrawn, it must be accepted by performance within a reasonable time, or it is conclusively presumed to have been revoked. *Mitchell v. Allen*, 553.
2. **REWARDS—PRESCRIPTION.**—A lapse of more than twelve years between the time that a reward is offered for the detection of an offender and the time of performance is more than a reasonable time, and raises a presumption that such offer has been revoked. *Mitchell v. Allen*, 553.

## RIGHT OF WAY.

See RAILROADS.

## RIPARIAN RIGHTS

See BOUNDARIES; WATERS, 5.

## ROBBERY.

1. **SUFFICIENCY OF INDICTMENT—ALLEGATION OF VALUE.**—An indictment for robbery, describing the property taken as "certain money and one silver watch and watch-chain, of the goods and chattels" of a person named, is sufficient without further allegation of value. *State v. Perry*, 564.
2. **INDICTMENT—ALLEGATION OF VALUE—CONVICTION OF MINOR OFFENSE.**—In an indictment for robbery no allegation of the value of the property taken is necessary to justify a conviction for larceny or a minor offense, upon failure to prove the aggravation for the robbery. *State v. Perry*, 564.
3. **INDICTMENT—ALLEGATION OF VALUE.**—An indictment for robbery is sufficient without averment of the value of the property taken. The pro-

ting in fear and taking the property constitute the gist of the crime, and are the only essential elements that need be alleged. *State v. Perley*, 564.

### ROYALTIES

See DOWER, 3; LANDLORD AND TENANT.

### RULES

See COURTS, 1, 2.

### SALES

1. ON A SALE OF CHATTELS BY A HUSBAND TO HIS WIFE, AN ACTUAL CHANGE OF POSSESSION must take place as in other transfers of personalty. It cannot be dispensed with on the ground of the marital relations of the vendor and vendee and the fact that she appointed him as her agent to hold possession for her. *Murphy v. Mulgrew*, 200.
2. TRANSFER OF CHATTELS—CHANGE OF POSSESSION.—The fact that a vendor and vendee are husband and wife, or parent and child, constitutes no reason why the provisions of the statute requiring every sale of personalty to be accompanied by an immediate delivery, and an actual and continued change of possession should receive a construction different from that applicable to other cases. *Murphy v. Mulgrew*, 200.
3. HUSBAND AND WIFE—SALE OF PERSONALTY—CHANGE OF POSSESSION.—The filing by a wife of an inventory of her separate property in accordance with the code does not, as to any of such property acquired by purchase from her husband, dispense with the necessity of an immediate delivery, and an actual and continued change of possession, to render such change effective as against his attaching creditors. *Murphy v. Mulgrew*, 200.
4. WARRANTY—PAROL EVIDENCE OF.—Under a written contract for the sale of a refrigerator, containing no warranty of its preserving qualities, parol evidence is not admissible to show that the vendor expressly warranted the apparatus to preserve meats for a certain time, and that it failed to do so. *McCray Refrigerator etc. Co. v. Woods*, 599.
5. WARRANTY—PAROL EVIDENCE OF.—Warranties, whether express or implied, can issue only from the contract itself, and cannot depend upon extrinsic evidence, except as may be necessary for the explanation of some latent ambiguity. *McCray Refrigerator etc. Co. v. Woods*, 599.
6. WARRANTY—PAROL EVIDENCE OF.—Under a written contract of sale containing no warranty, parol evidence is not admissible to add one. *McCray Refrigerator etc. Co. v. Woods*, 599.
7. ORAL WARRANTY.—If an article is sold by a formal written contract, which is silent on the subject of warranty, no oral warranty made at the same time or previously can be shown, and no additional oral warranty can be ingrafted on or added to one that is written. *Milwaukee Boiler Co. v. Duncan*, 33.
8. IMPLIED WARRANTY.—Where a known, described, and defined article is ordered of a manufacturer, and the exact thing bargained for is supplied, there is no implied warranty of its fitness for the use intended by the purchaser, although it may have been stated by him that it was required for a particular purpose. *Milwaukee Boiler Co. v. Duncan*, 33.
9. WARRANTY—WHEN NOT IMPLIED.—Under a written contract by a vendor to place a patent system of refrigeration in a refrigerator to be sold and furnished to the vendee, with nothing in the contract beyond the name

of the system to show that it was any thing in the nature of a refrigerating process, or that it was designed or intended to preserve meats, or that the vendee had any thing to do with meats, no implied warranty exists that the system would preserve meats for any particular length of time, nor can such warranty be shown by parol evidence. *McCray Refrigerator etc. Co. v. Woods*, 599.

10. **WARRANTY OF FITNESS**.—A clause in a contract to furnish a steam-boiler "to be allowed one hundred and thirty pounds of steam-working pressure by United States inspectors," has no reference to the capacity of the boiler, and is not to be construed as a warranty that the boiler contracted for would produce and maintain a working pressure to that amount. *Milwaukee Boiler Co. v. Duncan*, 33.
11. **CONTRACT—BREACH—USE OF ARTICLE PURCHASED**.—If a steam-boiler, guaranteed to be a first-class job, has apparent defects, known to the purchaser, he is in duty bound not to use the boiler in its defective condition, to his or its damage. *Milwaukee Boiler Co. v. Duncan*, 33.
12. **RESCISSI0N—RESALE BY VENDEE ON ACCOUNT OF VENDOR**.—One who orders perishable fruit through an agent, and is required to accept a draft for the purchase price before delivery or inspection of the fruit, and on inspection notifies both the agent and the vendor of his rejection of the fruit at the price agreed upon for failure of warranty of quality, may, after waiting a reasonable time and receiving no answer, either from the agent or the vendor, sell the fruit for the vendor's account and charge him with the loss. *Hitchcock v. Griffin*, 624.
13. **STATUTE OF FRAUDS—ORAL SALE OF PERSONALTY**.—In order to take a contract for the sale of personal property out of the operation of the statute of frauds, on the ground that labor, skill, and money are necessary to be expended in producing or procuring it, it must appear that the contract is essentially one calling for special skill, labor, or workmanship. *Mighell v. Dougherty*, 511.
14. **STATUTE OF FRAUDS—SALE OF GROWING CROP**.—An oral agreement for the sale of growing grain, to be delivered in marketable condition, under which no part of the purchase price is paid nor any of the crop delivered, while money and labor must be expended to make the crop marketable, is not taken out of the operation of the statute of frauds by virtue of an exception therein that it shall not apply "when the article of personal property sold is not, at the time of the contract, owned by the vendor, and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same." *Mighell v. Dougherty*, 511.
15. **STATUTE OF FRAUDS—ORAL SALE OF GROWING CROP**.—A sale of growing grain, to be delivered in marketable condition—harvested and threshed—when no part is delivered, and none of the purchase money paid, is within the statute of frauds, though one of its provisions exempts therefrom sales of personalty "when the article sold is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same." *Mighell v. Dougherty*, 511.

See **BROKERS**.

## SCHOOLS.

1. **MUNICIPAL BONDS—FRAUDULENT ISSUE—EVIDENCE OF**.—When, in an action by a *bona fide* holder on bonds of a school district purporting to have

been issued in satisfaction of a judgment against it as authorized by statute, the defense is set up that such bonds have been fraudulently issued after the judgment had been satisfied by a prior issue of bonds, the defendant, after showing that a diligent search has been unsuccessfully made for the records of the district, authorizing the first issue of bonds, and the secretary of the district has identified one of such bonds as having been issued in payment of the judgment, and has partly described the others, is entitled to have such bonds, purporting on their face to have been duly issued by the district, and having afterwards been found to be valid obligations against it by a court of competent jurisdiction, admitted in evidence to establish the fraudulent character of the bonds in suit. *First Nat. Bank, v. District Tp.*, 489.

**2. MUNICIPAL BONDS—FRAUDULENT ISSUE—RIGHTS OF BONA FIDE HOLDER.**

Bonds fraudulently issued by a school district in satisfaction of a judgment already paid create a new liability against the district, and, when they cause its total indebtedness to exceed the limit fixed by constitutional provisions, a purchaser for value before maturity is charged with notice of that fact, and cannot recover. *First Nat. Bank District Tp.*, 489.

See MUNICIPAL CORPORATIONS, 21.

SEAL.

See OFFICERS, 17.

SERVICES.

**1. MASTER AND SERVANT—SERVICES RENDERED AMONG RELATIVES.—**

Where near relatives reside together as a common family, and one of them renders services to another, and the latter furnishes him board and lodging or other necessities or comforts, a presumption arises that neither party intended to receive or pay compensation for the services rendered on the one hand, or for the board and lodging, or other necessities or comforts on the other, and the relation of aunt and nephew seems to be within the rule. *Estate of Kessler*, 74.

**2. MASTER AND SERVANT—AGREEMENT TO PAY FOR SERVICES—EVIDENCE.**

Evidence showing that the claimant, a nephew of the deceased, came at her request from Germany, and, though of full age, lived with her and carried on her farm, and managed her property for her until her death, a period of nearly nine years; that he had never lived with or worked for her before, and she had never occupied towards him any quasi parental relation, and he had never been the recipient of any thing from her by way of gift, or otherwise; that she had declared at various times to others that all her property was to go to him for his services, and that he himself expected to be compensated in that way for them, was held sufficient to sustain the finding of the trial court, that there was a contract between the parties that he should be so compensated. It was also held that the claimant was competent to testify that he rendered the services with the expectation that he would be compensated for them. *Estate of Kessler*, 74.

See CONTRACTS, 14, 19; MASTER AND SERVANT, 1.

SETTLEMENTS.

See COMPROMISE, 1.

## SEWERS.

See **SEWERAGE**, 4; **SEWERAGE**, 7; **SEWERAGE**, 2.

## SHERIFFS.

1. **JUDICIAL PROCESS**.—In an action against an officer by the party against whom process issued, to recover for an illegal seizure, the process, if valid, constitutes a complete justification. If, on the other hand, the suit is brought by another claiming title to the property seized, under the process against whom process issued, which title is consistent on the ground of law, the officer must, in addition to showing that he acted under such process, show that he acted under a valid judgment or as an officer of a creditor of the judgment debtor. *Township of Dryden v. Fuller*, 57.
2. **TOTAL JUDICIAL PROCESS**.—In an action by a mortgagee against a sheriff to recover for an illegal seizure of goods under execution against the mortgagor while in the hands of such mortgagee, if the officer attempts to justify the seizure on the ground that the mortgage is tantamount to a creditor, the mortgagee may prove that the seizure was made under which the process issued is void for want of authority of the mortgagee, and upon satisfactory proof of this fact the process is no justification. *Township of Myrick Dry Goods Co. v. Fuller*, 57.

## SHIPPING.

1. **MATERIALS CONTRACTS, WHAT ARE NOT**.—The fact that some of the materials used in the construction of a vessel were furnished after it was launched, and what does not show that the contract under which they were furnished was a maritime contract, nor that a proceeding is res to enforce the lien for such materials cannot be maintained in the state courts. *The Factoria*, 833.
2. **MATERIALS CONTRACTS, WHAT ARE NOT**.—A contract for building a ship or supplying engines, timber, or other material for its construction is not a maritime contract. *The Factoria*, 833.

See **ADMIRALTY**; **LIENS**.

## SLAUGHTER-HOUSES.

See **MUNICIPAL CORPORATIONS**, 23.

## SPECIFIC PERFORMANCE.

1. **THE CONSIDERATION** of a contract necessary to sustain a suit for its specific performance may consist either of some profit inuring to the promisee or some detriment sustained by the promisee. *Baker v. Wood*, 561.
2. **VENDOR AND PURCHASER**.—If the title is defective to property contracted to be sold or encumbrance against it existed, the purchaser will not be compelled to take the property nor to pay the purchase price, though he agreed to accept a deed without warranty. *Leach v. Johnson*, 754.
3. **SPECIFIC PERFORMANCE OF A BUILDING CONTRACT WILL BE DECREED** WHEN it appears that it was to furnish stone of a peculiar kind and texture which could be furnished by the defendant only; that enough had been furnished to build two-thirds of the walls, and, if defendant is not required to furnish the residue, it will be necessary to use other stone, and thus destroy the harmony and beauty of the building, or is



tear down the part already built, and rebuild with other materials. Though the court may not be able, owing to the defendant's pecuniary circumstances, to compel him to perform the entire contract, this will not deprive it of the power to compel him to permit plaintiff to take stone necessary to continue the work and to use defendant's appliances at the quarry. *Rector v. Wood*, 800.

### STATES.

1. **CONFLICT OF LAWS.**—ONE STATE OR SOVEREIGNTY CANNOT ENFORCE THE PENAL OR CRIMINAL LAWS OF ANOTHER, nor punish offenses committed in or against another state or sovereignty. *State v. Hall*, 822.
  2. **CRIMINAL LAW**—STATE WHERE CRIME IS DEEMED COMMITTED.—If a shot is fired in one state at a person in another, resulting in his death, the crime thereby committed is deemed to have been committed in the state where the shot takes effect, and not in the one where it was fired. Therefore, the courts of the latter state have no jurisdiction to try and punish the party, though he is one of its citizens. *State v. Hall*, 822.
- See INTERSTATE COMMERCE; JUDGMENTS, 5, 6; JURISDICTION; OFFICERS; TAXES.

### STATUTE OF FRAUDS.

See CONTRACTS, 13, 14, 19; SALES, 12-14; TRUSTS, 1.

### STATUTES OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

### STATUTES.

1. **CONSTITUTIONAL LAW**—TITLE OF STATUTE.—If the subject matter of a statute is composed of two or more essential elements, one only of which is expressed in its title, it is insufficient under a constitutional requirement that "every act shall embrace but one subject and matters properly connected, which subject shall be expressed in the title." Thus, when one of the objects of the subject matter of an act is to collect funds from foreign insurance companies, and another object is to dispose of such funds for the relief of firemen, the expression of one only of such objects in the title of the act renders the statute void. *Henderson v. London etc. Ins. Co.*, 410.
2. **CONSTITUTIONAL LAW**—TITLE, WHAT MAY BE EMBRACED IN LOCAL AND SPECIAL LAWS.—A statute entitled "An act to protect associations, unions of workingmen, and persons in their labels, trademarks, and forms of advertising," does not violate a constitutional provision that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title; nor is such statute obnoxious to a constitutional provision prohibiting the passage of local or special laws, and the granting of special privileges. *Cohn v. People*, 304.
3. **CONSTITUTIONAL LAW**—TITLE—WHAT MAY BE EMBRACED IN ACT.—Under a constitutional provision that statutes shall not embrace more than one subject, and that shall be embraced in its title, there may be included in a statute means reasonably adapted to secure the objects indicated by the title. When the general purpose is declared in the title the means for its accomplishment provided by the act are presumed to be intended as necessary incidents. *Cohn v. People*, 304.

4. **CONSTITUTIONAL LAW—TITLE HOW FAR CONTROLS.**—When, by virtue of constitutional provisions, the legislature must prepare and adopt the title to each law passed, to the end that such title shall express the general purposes of the act, the title cannot be resorted to extend or restrain any positive provision in the law itself. *Cohn v. People*, 304.
5. **CONSTITUTIONAL LAW—CONSTRUCTION—RESORT TO TITLE.**—In the construction of a statute the intention of the lawmakers is to be found and given effect. When there is otherwise doubt or obscurity in the act resort may be had to its title to enable the court to discover the intent, and remove what might otherwise be uncertain or ambiguous. *Cohn v. People*, 304.
6. **STATUTES, INTERPRETATION OF.**—Statutes must be construed with reference to the whole system of which they form a part. Therefore, statutes, even on cognate subjects, may be referred to, though not strictly *in pari materia*, in order to elucidate the intention of the legislature in enacting any given statute. *St. Louis v. Howard*, 630.
7. **CONSTITUTIONAL LAW.—CONSTITUTIONALITY OF LEGISLATIVE ACTS** is to be determined solely by reference to the limits imposed by the constitution. The sole question for the courts to decide is one of power, not of expediency, justice, or wisdom, and they should resolve all doubts in favor of the constitutionality of the statutes, or, if susceptible of two constructions, one of which is valid and the other invalid, they should give to them the former, on the presumption that the legislature did not intend to exceed its power. *Leep v. St. Louis etc. Ry. Co.*, 109.
8. **STATUTES NOT VOID FOR UNCERTAINTY.**—A statute declaring that if any railroad corporation shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight it shall be deemed guilty of extortion, is not void for uncertainty in not declaring what is a fair and reasonable rate. The courts have power to determine what is reasonable. *Chicago etc. R. R. Co. v. Jones*, 278.
9. **CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—When part only of a legislative act is void, the residue may sometimes be upheld, but judicial authority cannot substitute any thing in place of the void part. If the residue of the act cannot stand with the part cast out, then the whole must fall; and if the statute has but one object, and its provisions for the accomplishment thereof are void, the whole act is void. *Mayor v. Shattuck*, 208.
10. **CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. It may be entirely valid as to some classes of cases, and clearly void as to others. *Chicago etc. R. R. Co. v. Jones*, 278.
11. **CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—Although part of a statute is unconstitutional, the remainder is not to be declared unconstitutional also if the two parts are distinct and separable, so that the latter may stand, though the former is of no effect. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of the part rejected, it must be sustained. *Chicago etc. R. R. Co. v. Jones*, 278.
12. **CONSTITUTIONAL LAW—STATUTES VOID IN PART.**—When part of a statute relates to the prevention of unjust discrimination between persons and

places in rates charged by railroad companies for transportation, and another part relates to the prevention of charges in excess of reasonable rates on transportation wholly within the state, it may be valid as to the latter part, though void as to the former. *Chicago etc R. R. Co. v. Jones*, 278.

13. **CONSTITUTIONAL LAW.—NO LAW IS EX POST FACTO WITHIN THE MEANING OF THE CONSTITUTION UNLESS** it applies to crimes and their punishment, or punishes a party for acts antecedently done which, when done, were not punishable at all, or were not punishable to the extent or in the manner described. *Foster v. Police Commrs.*, 194.
14. **CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATIONS OF CONTRACTS.—**A statute tending to impair the obligation of a contract is inoperative as to contracts existing at the time of its passage, but valid and operative as to future contracts. *Burdick v. People*, 329.
15. **CONSTITUTIONAL LAW.—CLASS LEGISLATION** is such as denies rights to one which are accorded to others, or inflicts upon one a more severe penalty than is imposed upon another in like case offending. *People v. Bellet*, 589.
16. **A STATUTORY REMEDY CANNOT BE MADE EXCLUSIVE BY THE LEGISLATURE** as against a party who has a right to redress under the constitution of the state, unless such statutory remedy is commensurate with the constitutional right and the remedies to which, by force of the constitution, he was entitled for his protection. *Hickman v. City of Kansas*, 684.
17. **STATUTORY REMEDIES, WHEN CONCURRENT AND WHEN EXCLUSIVE.—**If a statute gives a remedy in the affirmative without containing any express or implied negative for a matter which was actionable at the common law this does not take away the common-law remedy. The statutory remedy will be regarded as concurrent. But when a new right or the means of acquiring it are given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy. *Hickman v. City of Kansas*, 684.
18. **CONSTITUTIONAL LAW—CONTROL OF RIGHT TO CONTRACT AS TO WAGES.** A statute requiring corporations and persons engaged in operating and constructing railroads and railroad bridges, and contractors and subcontractors engaged in the construction of any such road or bridge, to pay their employees on the day of discharge, the unpaid wages then earned by them at the contract rate, without abatement or reduction, and, if not so paid, then, as a penalty, such wages to continue at the same rate until paid, is void as to natural persons, as an invasion of the right to acquire, possess, and protect property, but is valid as to corporations, under reserved power to alter, revoke, or annul their charters. The words "without abatement or deduction" mean without discount for paying in advance of the time fixed by the contract, and do not prevent a corporation from offsetting the damages sustained by the employee's failure to perform his contract. Such statute is not special legislation, as it is general and uniform in operation on all persons within the class to which it applies. *Leep v. St. Louis etc. Ry. Co.*, 109.
19. **CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ANNEXATION—ELECTIONS.—**A statute requiring the question of annexation to a municipality to be submitted at an election to the determination of the taxpaying electors thereof, is not unconstitutional as requiring a property qualification. The word "election," as used in the constitution, refers only to elections of public officers. *Mayor v. Shattuck*, 208.

20. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—A man is not deprived of his property without due process of law unless it is taken away from him so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property, whose use and enjoyment is thus limited, is invested in a business affected with a public use, or is used as an accessory in carrying on such business. *Burdick v. People*, 329.
21. **CONSTITUTIONAL LAW.—DUE PROCESS OF LAW** means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. An act of the legislature is not necessarily the law of the land, nor can a state make every thing due process of law which by its own legislation it declares to be such. *Burdick v. People*, 329.
22. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—A statute which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power. It attempts to deprive a man of his property without due process of law. *Burdick v. People*, 329.
23. **CONSTITUTIONAL LAW—STATUTE REGULATING SALE OF RAILROAD TICKETS.**—A statute prohibiting the sale of railroad tickets or parts thereof, except by authorized agents, or by parties who have purchased tickets with a *bona fide* intention of traveling thereon, is not unconstitutional. It does not deprive an unauthorized holder of a ticket of his property without due process of law. *Burdick v. People*, 329.
24. **STATUTES.—A REPEAL BY IMPLICATION** does not exist unless there is a positive repugnancy between the provisions of the new law and those of the old, and even then the law is repealed by implication only *pro tanto* to the extent of the repugnancy. *State v. Walbridge*, 663.
- See ADMIRALTY; ADOPTION, 3, 4, 7, 9; CORPORATIONS, 1, 3; COURTS, 6; JURISDICTION, 1, 2; MILLS, 3; MUNICIPAL CORPORATIONS, 5, 17, 18; RAILROADS, 13; SUNDAY, 1; TAXES, 3, 5-7; TRIAL, 6; WILLS, 1, 2.

### STOCKHOLDERS.

See CORPORATIONS, 6.

### STREET RAILWAYS.

See RAILROADS, 24-26.

### STREETS.

See EASEMENTS 1, 3; INJUNCTIONS, 1, 2; MUNICIPAL CORPORATIONS, 31, 35-46; NEGLIGENCE, 8-13.

### SUNDAY.

1. **CONSTITUTIONAL LAW—SUNDAY LAWS—BARBERS.**—A statute making it unlawful for barbers to carry on their business on the first day of the week, known as Sunday, and excepting from its operation such persons engaged in such business as conscientiously believe the seventh day of the week should be observed as Sunday, and actually refrain from secular business on that day, is within the police power of the state, and not unconstitutional as class legislation, nor as depriving any person of life, liberty, or property without due process of law, nor as denying any person the equal protection of the law. *People v. Bellet*, 582.
2. **CONSTITUTIONAL LAW—SUNDAY LAWS AS SANITARY REGULATION.**—The police power of the state may be exercised, as a necessary sanitary

regulation, to prohibit citizens from engaging in secular pursuits on Sunday, although such pursuits are noiseless and harmless in themselves. *People v. Bellet*, 589.

### SURETYSHIP.

1. **OFFICIAL BONDS—FAILURE TO SIGN—LIABILITY OF SURETY.**—Failure of a principal to sign his official bond conditioned for the faithful performance of his official duty does not render it void nor release the surety from liability thereon. *City of Deering v. Moore*, 534.
2. **OFFICIAL BONDS—LIABILITY OF SURETIES—CONTRIBUTION.**—Sureties on an official bond who bind themselves severally to pay a certain sum named therein are bound to contribute to each other, so that all shall fare alike. The discharge of one by other than a sealed instrument on part payment of his liability does not release all, although a discharge by sealed instrument would have that effect. *City of Deering v. Moore*, 534.

See OFFICERS, 3.

### TAXATION.

1. **STATE TAXATION IS NOT OF UNIFORM AND EQUAL RATE** when applied to a portion only of a class of citizens, omitting a fraction of the same class, although such class is divided by county lines. The same rate of taxation must apply alike to all in any given taxing district. *Henderson v. London etc. Ins. Co.*, 410.
2. **CONSTITUTIONAL LAW—EQUAL AND UNIFORM TAXATION.**—The taxing power of the state cannot be made the means of levying municipal taxes upon a portion of a class of citizens, and of bestowing the tax so levied upon a small fraction of the citizens of the state. *Henderson v. London etc. Ins. Co.*, 410.
3. **CONSTITUTIONAL LAW—EQUAL AND UNIFORM TAXATION.**—A statute having for its objects the collection of funds from foreign insurance companies by taxation, and the disposition of such funds for the relief of firemen, in cities having paid fire departments, is unconstitutional, as not being a uniform and equal rate of taxation, and as applying to a portion of a class only. *Henderson v. London etc. Ins. Co.*, 410.
4. **TAXATION—ABSTRACT BOOKS.**—A set of books containing written abstracts of the titles to real estate, used as a means of profit and having a market value, are not exempt from taxation, because of their being in manuscript. *Leon Loan etc. Co. v. Equalization Board*, 486.
5. **COLLATERAL INHERITANCES—CONSTITUTIONAL LAW.**—A statute imposing an excise tax on collateral inheritances is not a tax on real or personal property within the meaning of constitutional provisions protecting the right to acquire and possess property, and providing that private property shall not be taken for public use without compensation, that all taxation shall be equal and uniform, and that no one shall be deprived of his property without due process of law. *Stute v. Hamlin*, 569.
6. **COLLATERAL INHERITANCES—CONSTITUTIONAL LAW.**—In the absence of constitutional prohibition the legislature may by statute dispose of an intestate decedent's estate, after payment of his debts, to any class of his kindred to the exclusion of any other class, and, if it permits collateral kindred to inherit it, may exact an excise tax or duty from such kindred for that privilege, so long as such excise is uniform as to the entire class of collateral, or it may require an excise from all collaterals

- and strangers, and exempt from the excise classes nearer in blood to the decedent. *State v. Hamlin*, 569.
7. **COLLATERAL INHERITANCES—CONSTRUCTION OF STATUTE.**—A statute imposing an excise tax on all collateral inheritances "above the sum of five hundred dollars," exempts that sum from each and every collateral inheritance, and is not an exemption from the corpus of the estate alone. *State v. Hamlin*, 569.
8. **PUBLIC OFFICERS—FIREMEN—TAXATION FOR BENEFIT OF.**—Firemen are not servants of the state, nor of a county, but of the municipality in which they serve, and the taxing power of the state cannot be exerted for their benefit upon only a portion of a class of the citizens of the state. *Henderson v. London etc. Ins. Co.*, 410.
- See MUNICIPAL CORPORATIONS, 47.

### TELEGRAPH COMPANIES.

1. **FAILURE TO DELIVER MESSAGE—DAMAGES.**—The negligent failure of a telegraph company to deliver a message whereby a purchase of bonds is not completed does not entitle the sender to recover more than nominal damages if the evidence fails to show that in case the purchase had been consummated the purchaser would have sold at a profit before the delay was discovered, even though the bonds advanced in price before that time. *Western Union Tel. Co. v. Fellner*, 81.
2. **DAMAGES.**—If, through a mistake in the transmission of a telegram, the owner of property is induced to sell it for its then market value he suffers no damage, and cannot recover any, though when the property subsequently advanced in value he repurchased a part thereof at the advanced rate. *Hughes v. Western Union Tel. Co.*, 782.
3. **DAMAGES—MENTAL ANGUISH.**—Unless otherwise provided by statute, mental anguish alone, resulting from negligent delay in the delivery of a telegram, does not constitute sufficient basis for the recovery of damages. *Summerfield v. Western Union Tel. Co.*, 17.
4. **STATUTORY LIABILITY.**—Wisconsin statute, chapter 171, laws of 1885, which provides that telegraph companies shall be "liable for all damages occasioned by failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages," creates no new elements of damage, and gives no right of action for damages resulting from mental suffering alone. *Summerfield v. Western Union Tel. Co.*, 17.

See MANDAMUS, 2.

### TENANTS IN COMMON.

See COTENANCY.

### TENDER.

See DEBTOR AND CREDITOR, 1, 2.

### THEATERS.

1. **MASTER AND SERVANT—THEATER MANAGERS—DUTIES AND LIABILITIES OF.** Theater managers who invite the public to become their patrons and guests owe a special duty to those accepting such invitation to protect them from injury while present, and particularly that they shall not suffer wrong or injury from the agents or servants of those who have invited them; and if such a servant, acting within the line of his duty,

commits a wrongful act toward such patron or guest, the manager and master is liable in damages therefor. *Dickson v. Waldron*, 440.

2. **MASTER AND SERVANT—THEATER MANAGER'S LIABILITY FOR WRONGFUL ACT OF HIS SERVANT.**—The servant or agent of a theater manager whose duty it is to preserve order in and about the theater must necessarily be the judge as to whether the conduct of a patron or guest is so offensive and disorderly as to require his removal, but if such servant, acting in the line of his duty, makes a mistake and wrongfully and unjustly attacks and injures an inoffensive patron of the theater, the manager thereof must respond in damages, and the fact that such servant is a special policeman will not relieve the manager and master from liability. *Dickson v. Waldron*, 440.

#### THREATS.

See EVIDENCE, 6.

#### TICKETS.

See RAILROADS, 4-14; STATUTES, 23.

#### TITLE.

See STATUTES, 1-5.

#### TOLL.

See MILLS, 1, 3.

#### TORTS.

See RAILROADS, 20, 21.

#### TOWNSHIP.

See MUNICIPAL CORPORATIONS, 11.

#### TRADEMARKS.

1. **WHETHER LAWFUL.**—A cigar label reading as follows: "This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship," is not unlawful as transgressing the rules of morality and public policy, and may be legally adopted. *Cohn v. People*, 304.
2. **WHETHER LAWFUL.**—A party may, without condemning or aspersing the product of other manufacturers, adopt a trademark commendatory of the article he has for sale, or he may lawfully procure the certificate of others as to the quality of the article he places upon the market, without transgressing the rules of morality or public policy. *Cohn v. People*, 304.

#### TREATIES.

See EXTRADITION, 1.

#### TRIAL.

1. **EVIDENCE—REASONABLE DOUBT.**—A reasonable doubt must be actual and substantial as contradistinguished from a mere vague apprehension, and must arise out of the evidence introduced. And the jury may be said to entertain a reasonable doubt when, after the entire comparison and consideration of all the evidence, they cannot say that they feel an abid-



ing conviction, to a moral certainty, of the truth of the charge. *Carlton v. People*, 346.

2. **EVIDENCE—REASONABLE DOUBT—PROOF TO A MORAL CERTAINTY.**—The two phrases, “proof beyond a reasonable doubt,” and proof “to a moral certainty,” are synonymous and equivalent, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible. *Carlton v. People*, 346.
3. **PRACTICE—OBJECTIONS TO EVIDENCE.**—When specific objections are made to evidence all objections not specified are waived. *St. Louis etc. Ry. Co. v. Hockett*, 105.
4. **PRACTICE—OYER OF INSTRUMENT.**—At common law, in suits upon sealed instruments, of which it was necessary to make proof, the defendant might demand oyer, and thereby have an inspection of the instrument sued upon. And, by the Illinois statute relating to practice, this rule is extended to all instruments declared on, whether under seal or not. The common law also furnished another mode, not confined to instruments under seal, which was by application, pending the action, to the equitable jurisdiction of the court for an order to inspect, but such order was obtainable only in a very limited number of cases. *Lester v. People*, 375.
5. **PRACTICE.—OYER OR INSPECTION IS CONFINED** to instruments in writing declared upon, and constituting the cause of action, or set up in a plea by way of defense, and does not apply when the deed is stated as mere inducement. *Lester v. People*, 375.
6. **STATUTORY CONSTRUCTION—PRODUCTION OF BOOKS AND PAPERS.**—Under the Illinois statute relating to the production of books and papers (Ill. Rev. Stats., c. 51, sec. 9), the court may compel the production of the books of a party, to be used in evidence on the trial by his adversary, upon proper showing that they contain entries tending to prove the issues. But the statute cannot be construed as giving the court power to take the books and papers of the party and impound them with an officer of the court for inspection or examination out of the presence of the court. It does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions. *Lester v. People*, 375.
7. **ERROR CURED BY INSTRUCTION.**—An instruction to the jury not to consider a particular count in the complaint cures error in admitting evidence thereunder. *Mighell v. Dougherty*, 511.
8. **INSTRUCTIONS.**—If in an action there is a counterclaim as well as a complaint and answer, and an instruction is asked respecting the burden of proof in its terms applicable to the whole case, it may be refused if it is correct with respect to the issue presented by the complaint only. *Glover v. Henderson*, 695.
9. **MOTION TO DIRECT VERDICT.**—A motion by defendant to direct a verdict in his favor can only be sustained by the court when there is a failure to prove some material fact in the case, by reason of which no liability of the defendant to plaintiff is shown. For the purposes of such motion every point which the evidence tends to prove in favor

of plaintiff must be considered as established. *Union Stockyards Co. v. Conoyer*, 738.

See CONSTITUTIONS, 4; OFFICERS, 11.

### TROVER.

#### CONVERSION—RETURN OF PROPERTY—DAMAGES FOR LEVY OF EXECUTION.

If property not liable to seizure on execution is levied upon by mistake, or if the levy is insufficient, and the property or part of it is returned to the person from whom it was taken upon discovery of the mistake, and before an action for the conversion is brought, the damages recovered for the taking of the part so returned should be merely nominal, unless special damages apart from the mere value of the property are shown. *Farr v. State Bank*, 40.

### TRUSTS.

1. PAROL EVIDENCE TO ESTABLISH.—Under the statute of frauds the existence of a direct or express trust in lands cannot be established by parol; but, when there is some written evidence of the existence of a trust, parol evidence is admissible to show the truth and nature of the transaction. *Johnson v. Calnan*, 224.
2. DEEDS TO A B "TRUSTEE"—PAROL EVIDENCE TO EXPLAIN.—When the word "trustee" is inserted in a deed to land after the name of the grantee, and, in a subsequent contract relating to the same land, he affixes this word "trustee" to his signature such word is not merely *descriptio personæ*. It indicates that the grantee takes the title, not in his individual capacity, but in trust for another not disclosed, and parol evidence is admissible to show for whom, and for what purpose, he was constituted a trustee. *Johnson v. Calnan*, 224.
3. JURISDICTION, APPOINTMENT OF TRUSTEES.—A trust will not be allowed to fail for want of a trustee, and therefore, where the trustee named refuses to act, another will be appointed to take his place. *Brandon v. Carter*, 673.
4. THE APPOINTMENT OF A TRUSTEE MADE AT THE INSTANCE OF A BENEFICIARY in place of one named in the will, on the ground that he refuses to act or accept such trust, cannot be collaterally attacked by a third person on the ground that the original trustee did not so decline or refuse to act, and was not a party to the proceeding by which the new trustee was appointed. *Brandon v. Carter*, 673.
5. PARTIES TO SUIT FOR APPOINTMENT OF NEW TRUSTEE.—If the complaint filed in a suit for the appointment of a trustee under a will alleges that the trustee designated in such will declines and refuses to act, and did not accept the trust, he is not a necessary party to the suit, and because if such allegation is true, no title ever vested in him. *Brandon v. Carter*, 673.
6. IN THE EVENT OF A VACANCY in the office of trustee, a court of equity has power to supply a trustee by appointment to assume the duties of such trust. *Brandon v. Carter*, 673.
7. DISCLAIMER BY A PERSON NAMED AS A TRUSTEE may be established by his action, or by his nonaction long continued. *Brandon v. Carter*, 673.
8. IF A TRUSTEE NAMED IN A WILL REFUSES TO ACCEPT the trust, the title to the trust property does not vest in him. *Brandon v. Carter*, 673.

### USURY.

See MILLS, 1.

**VACANT AND UNOCCUPIED.**

**See INSURANCE, 4.**

**VARIANCE**

**See PERJURY.**

**VERDOR'S LIEN.**

**See MECHANICS' LIENS, 1.**

**VENDOR AND PURCHASER.**

**See SPECIFIC PERFORMANCE, 2.**

**VERDICT.**

**See TRIAL, 9.**

**VESSELS.**

**See SHIPPING.**

**VICE-PRINCIPAL.**

**See MASTER AND SERVANT, 6; RAILROADS, 22.**

**WAGES.**

**See STATUTES, 18.**

**WAIVER.**

**See CONTRACTS, 20; JURISDICTION, 4 5; LIENS; MECHANICS' LIENS; TRIAL, 2.**

**WARRANTY.**

**See BROKERS, 1; EVIDENCE, 1; SALES, 4-10.**

**WATCHMEN.**

**See MASTER AND SERVANT, 5; RAILROADS, 21.**

**WATER COMPANIES.**

**CONTRACTS TO SUPPLY CITY WITH WATER, PROPERTY OWNER'S SUIT THEREON.**

If a water company contracts with a city to supply water for the extinguishment of fires, and to be answerable for damages resulting from a failure to comply with such contract, a property owner and taxpayer within such city has no contract relations with such water company and therefore cannot maintain an action against it upon the contract for damages arising from a failure to supply water as agreed upon though such failure has resulted in the destruction of his property by fire. *Howsmon v. Trenton Water Co.*, 654.

**WATERS.**

1. **WATERS ARE NOT DEEMED NAVIGABLE** in North Carolina, unless they are navigable for seagoing vessels. *State v. Eason*, 811.
2. **RIGHT TO POLLUTE.**—One who sinks artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on such premises is not liable to an injunction, nor for damages for allowing the water, after being so used, to flow into a stream which is the natural watercourse of the basin in which the artesian well is

situated, the owner thereof being free from negligence or malice, and using all due care in avoiding injury to his neighbors. *Barnard v. Sherley*, 454.

3. **RIGHT TO POLUTE.**—The natural right of a lower owner to have the water of a natural stream descend in its pure state must yield to the equal right of the owner above to use the water for useful and lawful purposes tending to make it more or less impure. It is not under all circumstances an unlawful or unreasonable use of a stream to throw or discharge into it waste or impure matter, and the question whether or not in any particular case such use is reasonable or not, is for the jury to decide. *Barnard v. Sherley*, 454.
  4. **AN INJURY TO A SUBTERRANEAN SUPPLY OF WATER** by lawful acts of an adjacent landowner done upon his own premises is, unless the stream is well defined and its existence known or easily discernible, or unless the injury is caused by malice, *damnum absque injuria*. *Williams v. Ladew*, 891.
  5. **RIPARIAN RIGHTS—DAMNUM ABSQUE INJURIA.**—Every man has the right to the natural use and enjoyment of his own property, and of a natural watercourse thereon, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor below, it is *damnum absque injuria*. *Barnard v. Sherley*, 454.
- See **BOUNDARIES**; **DAMAGES**, 4; **DOWER**, 1, 2; **EASEMENTS**, 4; **INJUNCTIONS**, 5, 7; **LIMITATIONS OF ACTIONS**, 6; **NUISANCE**, 2; **RAILROADS**, 16, 17.

## WAYS.

See **JUSTICES OF THE PEACE**, 1; **PRIVATE WAYS**.

## WILLS.

1. **COMPETENCY OF ATTESTING WITNESSES.**—The competency of attesting witnesses to a will is to be tested upon the state of facts existing at the time of such attestation, and not upon that existing at the time the will is presented for probate. The expression "credible witnesses," as used in the Statute of Wills, means competent witnesses. *Fisher v. Spence*, 360.
2. **SUBSCRIBING WITNESSES—CONSTRUCTION OF STATUTE.**—Section 8 of the Illinois Statute of Wills provides, in substance, that any beneficial devise, legacy, or interest, made or given to a subscribing witness to the execution of any will, testament, or codicil, shall, "as to such subscribing witness, and all persons claiming under him, be null and void." This provision is construed as having no application to the interests of any persons other than those who are attesting witnesses, and does not declare such interests null and void. Nor does the further provision of the statute assume to render competent any subscribing witnesses other than those to whom a beneficial devise, etc., was made or given. *Fisher v. Spence*, 360.
3. **WITNESSES—HUSBAND OR WIFE OF DEVISEE OR LEGATEE.**—The husband or wife of one named as devisee or legatee in a will is not a competent witness to prove the execution of the will, even as to devises and bequests made to persons other than to the wife or husband of such witness, and is not rendered competent by a release by the devisee or legatee of all his or her right, title, interest, and claim under the will. *Fisher v. Spence*, 360.

4. **TESTAMENTARY CAPACITY.**—The fact that a testator when he made his will was seventy-five years of age, weak and feeble, nervous, irritable, absent-minded, and of feeble memory, does not establish his want of testamentary capacity, if he was of strong will and had a good understanding of all the business in which he engaged. *In re Cline's Will*, 851.
5. **INSANE DELUSIONS.**—If there were facts or circumstances which would reasonably lead the testator to entertain a belief he possessed, such belief is not an insane delusion. *In re Cline's Will*, 851.
6. **INSANE DELUSION.**—If, in a controversy between a husband and wife, in which is included a suit brought by her against him for divorce, some of his children testified for, and seemed to sympathize with, her, and against him, and he then formed an opinion that they were hostile to him and determined on that account to disinherit them, his will made years afterwards in consequence of that determination cannot be said to be the result of an insane delusion. *In re Cline's Will*, 851.
7. **WHO MAY NOT CONTEST.**—After the adoption of a minor who, by the laws of the state, is entitled to succeed to the estate of its adopting parent, his other relatives have no capacity to contest his will, nor to oppose any disposition of his estate to which the adopting child does not object. *In re Williams*, 163.

#### WITNESSES.

1. **COMPETENCY—QUESTION FOR TRIAL COURT.**—The competency of a person offered as a witness to testify must be decided by the trial court, then and there, and its ruling is not subject to review nor disturbance, on appeal, unless a clear abuse of discretion is shown. *Dickson v. Waldron*, 440.
2. **HUSBAND AND WIFE.**—A wife is competent to testify against her husband on trial for perjury in making a false affidavit in his suit for divorce against her. *Dill v. People*, 254.
3. **HUSBAND AND WIFE.**—A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted. *Dill v. People*, 254.
4. **PRIVILEGE FROM.**—PARTIES AND WITNESSES attending in any legal tribunal are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning. This privilege extends to the service of a summons as well as to arrest. *Cameron v. Roberts*, 43.

See COURTS, 2; PROCESS; WILLS, 1-3.











